Supreme Court, U.S.
FILED

No. 97 1568 DEC 29 1997

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In The

Supreme Court of The United States

October Term 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,

Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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123 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the majority of the Eighth Circuit panel interpreted ***Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. 3034 (1982) in a manner inconsistent with other circuit courts. The Eighth Circuit focused on that part of ***Rowley*** which stated that grades and grade promotion were an important factor in determining FAPE, and ignored standardized tests which established that Nicholas Clynes could not read at the end of the third grade. The Eighth Circuit found, in effect, "social promotion" to be the sole criterion by which FAPE is determined. Other circuits have interpreted "some educational benefit" as excluding de minimis and trivial educational achievement, thereby repudiating the concept of "social promotion." Thus, on similar facts, children with similar disabilities are subject to wildly differing interpretations of what FAPE is because when this Court in ***Rowley*** defined it as "some educational benefit," it intentionally left the meaning of that phrase undefined. Unequal justice has resulted.

II.

Whether the majority of the Eighth Circuit panel misinterpreted ***Rowley*** when it refused to defer to the findings of the district court. Other circuits provide that a district court has virtually de novo review over a due process hearing officer's decision. In the Eighth Circuit, the decision of the due process hearing panel is dispositive and may not be overturned by a district court, regardless of its independent review or gathering of new evidence. This split in the

circuits in regard to the deference to be accorded findings of a district court, and the role of a circuit court, have allowed for result-oriented decision making with the effect that children with disabilities receive unequal justice.

III.

Whether the majority of the Eighth Circuit panel created a split in the circuits when it held that in a two-tiered system, like that in Missouri, deference is due the due process hearing panel, not the State Level Review Officer. In the Third Circuit, it is the last state administrative officer that reviews an IDEA case to whom the deference is due. In the instant case, the due process hearing panel found two-to-one against the Clynes, but the State Level Review Officer reversed. The Eighth Circuit gave dispositive deference to the majority of the due process hearing panel, with the result that the decision in this case is exactly opposite of what it would have been had the Clynes lived within the Third Circuit.

LIST OF ALL PARTIES

Petitioners

Robert Clynes and Ann Clynes, as Parents and Next Friends of Nicholas Clynes.

Respondents

Ft. Zumwalt School District.

Dr. Bernard DuBray, Superintendent of the Ft. Zumwalt School District, at all times relevant.

Pat Moore, Director of Special Education Services for Ft. Zumwalt School District, at all times relevant.

Phyllis Wigg, Principal of the Hawthorne Elementary School, a school operated by Ft. Zumwalt School District, at all times relevant.

Linda Burke, a diagnostic technician employed by Ft. Zumwalt School District, at all times relevant.

Karla Ruhr, Special Education Teacher at Hawthorne Elementary School, at all times relevant.

Jeanie Lotz, First Grade Teacher at Hawthorne Elementary School, at all times relevant.

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After a one day due process hearing, a majority of the panel issued an opinion on or about February 9, 1993, denying reimbursement to the Clynes. (App. 10-21).[1]

Pursuant to an appeal made by the Clynes to the State Level Review Officer, he issued an opinion on June 29, 1993, in which he found that FAPE had been denied by the public school to Nicholas Clynes, and order reimbursement. (App. 22-36).

Ft. Zumwalt took an appeal to the district court which held a hearing and entered extensive findings of fact and conclusions of law which affirmed the State Level Review Officer, found that Nicholas had been denied FAPE by the public school, and ordered reimbursement to the Clynes. ***Ft. Zumwalt v. MO State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996).

Ft. Zumwalt appealed to the Eighth Circuit which in a two-to-one opinion, reversed the district court and the State Level Review Officer, found that Nicholas had been provided FAPE by the public school, and denied reimbursement. ***Ft. Zumwalt v. Clynes***, 119 F.3d 607 (8th Cir. 1997).

On September 30, 1997, the Eighth Circuit denied the Petition for Rehearing with a Suggestion that It Be Reheard En Banc, filed by the Clynes.

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[1]Cites to "App." refer to the Appendix filed in the Eighth Circuit.

JURISDICTIONAL STATEMENT

The Eighth Circuit panel entered its decision on July 10, 1997. The Clynes filed a Petition for Rehearing, with a Suggestion that the Case Be Reheard En Banc. Both motions were denied on September 30, 1997. Petitioners Nicholas Clynes and his parents invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254.

Jurisdiction in the Eighth Circuit was invoked pursuant to 28 U.S.C. § § 1331, 1291, and 20 U.S.C. § 1415(e)(4)(A).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1415:

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to - -

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the

child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit - -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) producers designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parent` or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decisi on by State educational agency

If the hearing required in paragraph (2) of subsection (1) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded - -

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in

calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if - -

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceedings begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that - -

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the

amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, tile V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1401(a)(18)

A "free appropriate public education" is defined as:

"special education and related services that - -

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

STATEMENT OF THE CASE

Introduction

Nicholas's Experience at Fort Zumwalt [The Public School]

Nicholas attended first grade at Hawthorn Elementary School during the 1987-88 academic year, a part of the Ft. Zumwalt School District. (App. 390).[2] Early in the school year his teacher began recommending retention. (App. 404). Despite Ann and Robert Clynes working two (2) to three (3) hours with their son each evening, Nicholas still failed his regular classroom English the first quarter of the school year. (App. 394, 412, 1061).

Nicholas was retained in first grade during the 1988-89 academic year. (App. 397). The IEP written for his repeat of the first grade identified weaknesses in reading, spelling, and math. (App. 734-741). Despite Nicholas's continued problems in these areas, the IEP decreased resource room time by 15 minutes a day. (App. 734-741).

Nicholas was promoted to the second grade during the 1989-90 school year. (App. 401, 1056-1063). The IEP for this academic year again reduced the resource room time, this time by thirty (30) minutes a day; thus, in second grade Nicholas was receiving special education assistance from the public school only one (1) hour a day. (App. 402, 742-748).

At the start of Nicholas's second grade year at the public school, in September 1989, the District re-evaluated him for learning disabilities. (App. 770-778). Test scores revealed that Nicholas's word attack skills, oral reading, and comprehension were all below grade level. (App. 771). Nicholas's writing was

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[2]Cites to "App." refer to the Appendix filed in the Eighth Circuit. Cites to "Pet. App." refer to the appendix in this document.

deemed below an age appropriate level. Id.

In May 1990, an IEP was developed for Nicholas's upcoming third grade year. (App. 783-791). That IEP did not set any goals for word attack skills despite the fact that the District attributed Nicholas's weakness with word attack skills to his learning disability. (App. 180). The focus of the IEP was on comprehension and memorizing Dolch sight word lists. (App. 241).

In 1990-91, Nicholas was promoted to third grade by the public school. (App. 405, 1056-1063). Except for science, Nicholas's grades were mostly Ds and Fs; Nicholas's resource room work showed a continuing decline. (App. 406-407, 1056-1063). Despite Nicholas's ongoing problems in third grade, his resource room time was decreased again by fifteen (15) minutes to forty-five (45) minutes a day. (App. 405).

A standardized test given to students in the State of Missouri, the MMAT, showed that in spring 1991 eighty-five percent (85%) of Nicholas's grade level peers read better than he did; he was in the fifteenth percentile (15%) in math; he was in the eighteenth percentile (18%) in science; and, the eighth percentile (8%) in social studies and civics; because the public school failed to teach Nicholas basic educational skills, his parents removed him to the Churchill School [the private school] so that he might receive an appropriate education. (App. 164-165, 1053-1055, 436, 429).

Nicholas's Experience at the Churchill School [The Private School]

The District Court found that at the private school, Nicholas's attitude and self-esteem improved as did his reading skills. (App. 334; 482-492; 570; 574; 576). As Nicholas made

academic progress and his word attack skills improved, his attitude, his willingness to meet new challenges, and his self-esteem improved. (App. 334, 212-213; 818-846). Nicholas benefitted from the private school's demystification program. (App. 578). He earned a roll in a school play about learning disabilities. (App. 578-579).

Standardized test results in September 1991, shortly after Nicholas left the public school for summer school at the private school, revealed that his reading skills ranked in the second to ninth percentile (2% - 9%). (App. 956). The same tests administered in May 1992, after a year at the private school, showed a rise in the ranking of Nicholas's reading skills to a range between the twelfth and fifty-fourth percentile. (12% - 54%). Id. Nicholas's rank in word attack skills jumped from the second percentile to the twenty-fifth percentile. (2% - 25%). Id. The tests administered by the public school in September 1992 showed improvement in Nicholas's word attack skills. (App. 856). Tests administered by the private school also revealed progress with word attack skills. (App. 866).

Due Process Hearing

Ann and Robert Clynes asked for a due process hearing, which was held on February 1, 1993. (App. F-10).

The majority opinion summarized the testimony presented to it, but did not weigh that testimony. (App. 11-13). In its "Decision and Rational" the majority opinion mis-stated the law and improperly placed the burden of proof upon the Clynes. (App. 32).

The majority opinion found that Nicholas was making progress at the public school by referring to "his regular class grade cards, his special education progress notes, and the report

from the private therapist working with him. . .." (App. 13). In coming to its conclusion that Nicholas made progress at the public school, the majority opinion did not refer to the standardized tests given by the State of Missouri, the MMAT. (App. 13).

The majority opinion denied reimbursement to the Clynes, on the basis that the public school had not tried "a more intensive service level such as a self-contained special education classroom or other supplementary aids . . .." (App. 13). The majority opinion ignored the fact that the public school never offered a self-contained classroom until after Nicholas succeeded at the private school in such a setting. (App. 663). The majority opinion ignored the undisputed testimony before it that the public school admitted that it had "tried everything it could think of" but failed, and had given up on Nicholas. (App. 432-434). The majority opinion did state that Nicholas had succeeded at the private school and that the private school needed to be consulted so that its program could be used at the public school. (App. 13-14).

The majority opinion did not determine whether the public school proved that it had provided a free appropriate public education to Nicholas; rather, implicitly noting the deficiencies of the public school program, it recommended that the private school program be adopted at the public school. (App. 14).

Decision of State Level Review Officer [SLRO]

The SLRO found that the various IEPs showed a hit and miss approach to dealing with [Nicholas's] failures; that there was no focused effort to follow-up on failures and to produce a plan of progress that could be clearly demonstrated; that teacher comments on Nicholas's report cards were for the most part well-intentioned attempts to find positive things for comment; however, the comments overstated performance and at times were contradictory.

(App. 34-35). The SLRO concluded that Nicholas was denied FAPE because: First, the panel improperly imposed a burden on the parents of proving that their son was regressing while attending the Ft. Zumwalt School District. Second, the panel improperly identified the issue before it. The question was not whether Nicholas was regressing. The question was whether the education being offered was appropriate. And, third, the majority never made credibility findings; there was nothing to indicate what weight or consideration the majority gave to the seven (7) witnesses who appeared before it. Fourth, there was no indication that the panel evaluated the various tests and reports describing Nicholas' progress. Fifth, the law requires more than a finding that Nicholas was not regressing and was making some unquantifiable progress.

The public school appealed to the district court.

Opinion of the District Court

The district court made thorough and comprehensive findings of fact and conclusions of law. ***Ft. Zumwalt v. MO State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). Those which are particularly salient for an understanding of the issues at bar are summarized as follows.

In September 1989, Nicholas's word attack skills were at a first-grade level. (App. 330, 1050). By May 1991, Nicholas's word attack skills had hardly improved; they were still at a first-grade level. Id.

When Nicholas entered the 1991 summer session at the private school, he could not read words that were new to him. (App. 331; 422, 560; 200; 1216-1218). He did not know his ABCs, the days of the week, or the months of the year. (App. 331; 477; 1191-1192).

Nicholas could identify three-letter consonant-vowel-consonant words, and he could use sighted words to garner the meaning of passages. (App. 331, 576, 590). That is, he could recognize words that he memorized, words from the Dolch site word lists, as one would recognize a picture or drawing but he had no way of figuring out a word that he had not seen before. (App. 331; 590-592). Nicholas therefore exhibited strength in the area of comprehension but serious weakness with word attack skills consistent with his learning disabilities. (App. 331; 1050, 1053-1055; 1216-1218, 732-732A).

Nicholas's performance in the public school had declined from first to third grade because it became harder and harder for him to memorize or retain the growing vocabulary he needed to pass his classes. (App. 331; 590-591). Mrs. Burke, the district's own psychological examiner, admitted that tests show that Nicholas was not reading at grade level when he left the public school. (App. 331; 604; 181).

A staffing report by the public school in October 1992 states that Nicholas experienced "significant academic growth" during the 1992-93 school year while attending the private school. (App. 338). According to the report, teacher observations indicated "emotional growth," specifically in the areas of "self-concept, task completion, task initiation, and the development of coping mechanisms to deal with frustration." (App. 337).

The district court noted that while Nicholas did advance at the public school from one grade to the next after the 1988-89 school year and passed many of his classes, most disturbingly, his word attack skills never advanced beyond a first-grade level while he attended the public schools. (App. 351). Even after the public school's methods did not succeed, it did not consider changing the

placement of Nicholas. (App. 351). The third grade IEP did not even set goals for word attack skills. (App. 351).

The district court found that by failing to address Nicholas's serious decoding problems, the public school failed to address adequately Nicholas's learning disability. (App. 351).

Opinions of Eighth Circuit Majority and Dissent

In a two-to-one decision a majority of the Eighth Circuit panel that heard this case ignored the findings of fact of the district court, ignored the findings of fact of the SLRO, and reinstated an equivocal and cursory four page opinion of the due process hearing panel majority.

Instead of deferring to the findings of fact made by the district court after its one day hearing in this case, or giving due deference to the findings of fact by the SLRO, or even examining the cursory and equivocal findings of fact of the due process hearing panel majority, the Eighth Circuit majority made its own findings of fact.

The majority of the Eighth Circuit found FAPE even though Nicholas was receiving Ds and Fs in reading, and standardized test scores showed that ninety-eight percent of his age appropriate peers read better than he did. The majority ignored findings below that Nicholas had been passed from grade to grade as a matter "social promotion," rather than academic achievement. The majority found that although Nicholas may well have benefitted more from his education at the private school, and did not read as well as his non-disabled peers, the "IDEA does not require the best possible education or superior results." ***Ft. Zumwalt***, 119 F.3d at 613. Citing to ***Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. 3034 (1982), the majority concluded that courts have no specialized knowledge in matters of

special education; therefore, when a due process hearing panel finds some unquantifiable progress is being made, FAPE has been provided.

The dissent noted that as a standard of review, the SLRO was the one to whom the court owed deference under Missouri's two-tiered administrative system. Id. at 616. The dissent found that when the district court's findings of fact were reviewed for clear error, the correct standard, a conclusion that FAPE had been denied to Nicholas was mandated. "By the end of the year, Nicholas had failed spelling and had managed to raise a failing grade in reading for the third quarter to a D for the final quarter." As stated in the dissent:

> "I agree with the SLRO and the district court that the IEP for 1991-1992 was not designed to provide 'personalized instruction with sufficient support services to permit [Nicholas] to benefit educationally from that instruction.' Rowley, 458 U.S. at 203, 102 S.Ct. at 3049. By submitting an IEP substantially similar to others that had previously produced so few positive results, and by exhibiting an unwillingness to explore any different approaches, (fn. 10) [the public school] did not extend to Nicholas the free appropriate education mandated by IDEA. To be sure, Nicholas was steadily advancing from grade to grade in the [public] schools, and the Supreme Court has stressed that '[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit,' Rowley, 458 U.S. at 203, 102 S.Ct. at 3049, but Nicholas's achievements, particularly in the area of reading skills can at best be described as trivial. This cannot be the sort of education Congress had in mind

> when it enacted the IDEA. [citation omitted] The majority, in resolving that [the public school] did offer Nicholas a free appropriate public education, not only does disservice to Congressional intent, but also disregards the deference we are required to give to the conclusion reached by the SLRO. (fn. 11)."

Id. at 617-618.

REASONS FOR GRANTING THE WRIT

Introduction

The Clynes request that this Court issue a Writ of Certiorari and hear this case so that it can make definite the meaning of the phrase "some educational benefit," used by it in ***Board of Education v. Rowley***, 458 U.S. 176,200, 102 S.Ct. 3034, 3048 (1982), and thereby eliminates the scourge of "social promotion." Second, the Clynes request that the writ be issued so that this Court can make clear the appropriate deference that must be shown to a due process hearing officer, or panel, and the extent of independent review to be accorded a district court. Third, the Clynes request that this Court clarify the deference due each of the various state administrative agencies deciding IDEA cases when there is a two-tier system of review.

In each of these situations there is a split in the circuits. In some instances there is virtually no standard. Each circuit has a different rule, standard, and analytical process by which it determines if FAPE has been provided. And, because there is no rule, and thus no single standard and no single process, the outcome of each case is dictated by the which circuit the parents live in rather than by any coherent, consistently applied rule of law.

Because this Court in ***Rowley*** left undefined the meaning of "educational benefit," there is no uniform interpretation of what it means. It means something different in each circuit, depending more on the personal predilections of judges than on a consistent analytical process based upon a fixed rule of law. What is educational benefit? In some circuits, standardized test scores which show de minimis results prove a denial of FAPE. In other circuits, being promoted from grade to grade while receiving Ds and some Fs is educational benefit, regardless of standardized test scores. Is educational benefit to be measured by objective testing of skills or by mere advancement from grade to grade, a process subject to manipulation by school authorities and known as "social promotion."

Similarly, in regard to the appropriate standard of review, the circuits employ widely differing and sometimes diametrically opposed standards. Once a due process hearing officer makes a decision, based upon whatever he thinks the phrase "educational benefit " means, there is a split in the circuits as to the deference to be accorded to such a decision. In this case, the Eighth Circuit decided that the due process hearing panel's finding of educational progress is, in effect, irreversible. If the due process hearing panel finds some unquantifiable "progress" is being made, as in this case, and there is evidence the child has been promoted to the next grade even with grades of Ds (social promotion), then the panel cannot be overturned, for by doing so the reviewing authority would impermissibly substitute its own notions of education for that of the panel, in violation of ***Rowley***. But, in the Fifth Circuit, the district court has virtually de novo review powers and may engage in an independent review and reverse a due process hearing officer's conclusion on educational benefit. The Ninth, Sixth,

Fourth, and Third Circuits also grant more deference to findings of fact made by the district court, than the Eighth Circuit.

In ***Rowley***, this Court left to the local educational authorities the methodology of teaching students with learning disabilities. This Court intentionally left undefined the contours of "some educational benefit," and the appropriate standards of review. That intentional vagueness has caused a split among the circuits and an injustice to Nicholas Clynes. If Nicholas Clynes had grown up and gone to school in Virginia, or California, for instance, he would have prevailed on the facts in this case. See, ***Carter v. Florence County School District Four***, 950 F.2d 156 (4th Cir. 1991), *aff'd*. ***Florence v. Carter***, 510 U.S. 7, 114 S.Ct. 361 (1993); ***Capistrano Unified School District v. Wartenburg***, 59 F.3d 884 (9th Cir. 1995). Presumably, if he had gone to school in Texas he would have prevailed because the Fifth Circuit gives far less deference to the due process hearing panel and far more independence to the district court. See, ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997), *cert. denied* 118 S.Ct. 690 (1998).

As a result of this Court's lack of precision and definition in ***Rowley*** , justice for children with disabilities pursuant to the IDEA is random, uneven, and unpredictable. Children with similar disabilities and with similar needs are subject to different results in different circuits.

Some Educational Benefit

It is now time, some fifteen years after this Court's decision in ***Rowley***, for it to announce that a free appropriate public education ("FAPE") is not provided, and that some educational benefit is not provided, when objective tests show that a student after finishing the third grade cannot read. It is now time for this

Court to declare that "social promotion" is not FAPE and school districts can no longer rely on passing grades to avoid their responsibilities. While this Court noted in ***Rowley*** that advancement from grade to grade constitutes an important factor in determining educational benefit, the Clynes believe that "social promotion" cannot be a criterion for determining if FAPE has been provided. ***Rowley***, 458 U.S. at 203, 102 S.Ct. at 3049. Indeed, this Court stated in regard to passing grades and promotion from grade level to grade level:

> "We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.' In this case, however, we find Amy's academic progress, when considered with the special services and the professional consideration accorded by the Furnace Woods School Administration, to be dispositive."

Id. at fn. 25. The Clynes urge this Court to now give concrete contours to FAPE and guidance to the lower courts by declaring that objective measurements have an equally important place in the determination of whether a child with learning disabilities has received "some educational benefit." This Court should outlaw the scourge of "social promotion." The promotion of students with grades of Ds in order to avoid an adverse due process hearing decision must be stopped. Because of the lack of Guidance by this Court in ***Rowley***, the Eighth Circuit felt justified in giving no weight to the objective tests which established that Nicholas could not read after the third grade. Without the use of standardized test scores, how are parents like the Clynes to establish that school

districts passed a child from grade to grade so it could prevail in an IDEA case – the "social promotion" phenomenon. What evidence can a parent bring to bear to show that the school district does not provide an educational benefit to their child, in spite of the protestations to the contrary by the teachers, other than by showing that standardized and objective tests establish, as in this case, that as many as 98% of Nicholas's peers read better than he did after the third grade?

The Eighth Circuit relied on this Court's decision in ***Rowley*** to find that Nicholas was provided FAPE. Indeed, the dissent came to the opposite conclusion, also in reliance upon ***Rowley***. Yet, the majority of the Eighth Circuit came to its conclusion without discussing ***Rowley*** in detail. A close look at Amy Rowley, and a comparison of her situation to that of Nicholas Clynes, reveals that the lower courts are ignoring the facts in ***Rowley***, but using its generalizations to come to whatever educational conclusions their personal predilections dictate. The vagueness of ***Rowley*** allowed the Eighth Circuit to elevate "social promotion" over Nicholas's academic non-performance which was established by standardized tests.

Amy Rowley sought "a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP." ***Rowley***, 458 U.S. at 185-188, 102 S.Ct. at 3040-3041. Both the school administrators and the due process hearing officer denied the Rowley's request because Amy was making satisfactory progress educationally, academically, and socially without such assistance. *Id.* In contradistinction, the Eighth Circuit acknowledged that Nicholas Clynes had behavioral difficulties at Ft. Zumwalt. ***Ft. Zumwalt School District v. Clynes***, 119 F.3d 607, 612 (8th Cir. 1997). "Evaluations of Nicholas done

when he was in second grade characterized him as poorly motivated, easily frustrated, and feeling different from his peers." *Id.* Unlike Amy Rowley, Nicholas Clynes was not making satisfactory progress socially.

Educationally, the district court found that Amy was a remarkably well-adjusted child who interacted and communicated well with her classmates and had developed an extraordinary rapport with her teachers. ***Rowley***, 102 S.Ct. at 3040. As for Nicholas, the Eighth Circuit noted that his teachers told Mrs. Clynes that they did not know what else to do for Nicholas since he had chosen not to learn. ***Ft. Zumwalt***, 119 F.3d at 612. The Director of Special Education told Mrs. Clynes that some children are just non-readers. *Id.* Unlike Amy Rowley, Nicholas Clynes did not have a good rapport with his teachers. Nick's teachers, and even the special education director, had quit on him.

Academically, the district court found that Amy Rowley performed better than the average child in her class and was advancing easily from grade to grade. ***Rowley***, 458 U.S. at 185, 102 S.Ct. at 3040. But, the Eighth Circuit noted that Ft. Zumwalt wanted to hold back Nicholas Clynes for a year in kindergarten. ***Ft. Zumwalt School District***, 119 F.3d at 612, fn. 3. Rather than easily passing from grade to grade, Nicholas repeated first grade. Unlike Amy Rowley, Nicholas Clynes did not advance easily from grade to grade.

In ***Rowley,*** this Court criticized the lower courts' requirement that a school district maximize the potential of its students. The district court, understanding FAPE as an opportunity to achieve one's full potential commensurate with the opportunity provided to other children, found a denial of FAPE in the disparity between Amy's actual achievement and her potential. ***Rowley***, 458

U.S. at 185-186, 102 S.Ct. at 3040. In the instant case, Nicholas Clynes never argued that Ft. Zumwalt was required to maximize his potential. What Nicholas Clynes argued, and what the SLRO, the district court, and the dissent on the Eighth Circuit panel found, was that the dramatic disparity between him and his age appropriate peers, as defined by objective measurements, and his inability to read, established that he was receiving a trivial educational benefit.

In IDEA appeals district and circuit courts sometimes defer to the due process hearing panel's findings of fact and sometimes do not, leaving in their wake uncertainty and decisions dictated by result-oriented biases. It cannot be left to the discretion of appellate judges in the various circuits to decide what "some educational benefit" means. Clearer guidance from this Court is mandated.

The Eighth Circuit majority found that grades of Ds and Cs, and an inability to read as measured by an objective standard, met this Court's test of "some educational benefit." The dissent noted that "Nicholas had failed spelling and had managed to raise a failing grade in reading for the third quarter to a D for the final quarter." ***Ft. Zumwalt***, 119 F.3d at 616-617. The dissent in this case, citing ***Rowley***, found that FAPE contemplates something more than mere trivial advancement.

In contradistinction to the Eighth Circuit, the Second Circuit in ***Mrs. B. v. Milford Board of Education***, 103 F.3d 1114, 1120-21 (2nd Cir. 1997), reasoned that the ***Rowley*** standard contemplates more than mere trivial advancement. In that case, the Second Circuit, in discussing the phrase "educational benefit," as used by this Court in ***Rowley***, found it to be a matter that the trial court must determine on the preponderance of the evidence.

Id. The Second Circuit then noted that this Court in ***Rowley*** did not establish one standard for determining what constitutes meaningful educational benefit, but noted that such factors as grading and advancement were important. The Second Circuit noted that other circuits have held that this standard contemplates something more than "mere trivial advancement." *Id.* at 1121. In regard to the substantive issue, the Second Circuit noted that the child failed to meet nearly all the objectives set in her IEP and that nearly all of her grades were all unsatisfactory. "It is an inescapable fact that over the course of three years, despite being of average to just slightly below-average intelligence, MM did not advance more than one grade level in any subject." *Id.* In the instant case, the public school wanted to hold Nicholas back in two of his first five years. Nicholas did repeat the first grade. When he left the public school at the end of his third year he did not know his ABCs, the days of the week, or the months of the year. Ninety-eight percent of his age appropriate peers could read better than Nicholas. Yet, he was of above-average intelligence. In striking contradistinction to the Second Circuit in ***Mrs. B***, the majority of the Eighth Circuit panel never discussed trivial education or advancement. What the panel majority did say was that Nicholas received some benefit and therefore he was provided FAPE under ***Rowley***, even though he could not read. But the Eighth Circuit majority found that the request by his parents that he learn to read as well as his age-appropriate peers was not covered by the IDEA, which "does not require the best possible education or superior results." ***Ft. Zumwalt v. Clynes***, 119 F.3d at 613. This Court should strike down the notion that reading at grade level for a child with above-average intelligence is deemed a "superior result," lest parents, school teachers, and courts fail to

demand that children be educated in public school and not warehoused there.

In ***M.C. v. Central Regional School District***, 81 F.3d 389 (3rd Cir. 1996), the parents of J.C., a severely retarded sixteen year old boy, sought both a residential placement and compensatory education for what they believed to be long-standing deficiencies in his educational program. The due process hearing officer found that J.C. was not capable of more than very limited progress and that in light of the slight improvement shown by J.C. the school district had provided him the educational benefit required by ***Rowley***. The district court reversed the due process hearing officer finding that "some educational benefit" meant something more than de minimis benefits. "According to the district court, the 'limited and varied' progress that the [due process hearing officer] found was de minimis and therefore not sufficient to satisfy IDEA." ***M.C.***, 81 F.3d at 393.

In the Eighth Circuit, a finding of the due process hearing officer that J.C. had benefitted from his public school education would have been irreversible. Substantively, the Third and Second Circuits require something more than the unquantifiable progress the due process hearing panel found that Nicholas made. In those circuits, Nicholas's standardized test scores and grades of below a C would have been sufficient for the district court to have made independent, virtually de novo, findings of no educational benefit. A district court finding which was made in this case, that would have been affirmed in those circuits.

Objective tests must be an important factor in determining FAPE. This Court must draw a bright line and say that the failure to read as measured by objective tests is an important and perhaps dispositive factor in determining whether FAPE has been provided.

If subjective measures such as grades and grade promotion are dispositive, school districts will always "socially promote" a learning disabled child. Certainly, that is the advice school district attorneys are providing in the Eighth Circuit after the ***Clynes*** decision.

Amy Rowley was provided FAPE because she could easily pass her classes, be promoted from grade to grade, displayed superior intellect, and got above-average grades. In the Eighth Circuit, Nicholas Clynes was provided FAPE even though he could not read, was flunking spelling and reading, and got no grade higher than a C in anything, but was nevertheless "socially promoted."

Because there is no uniform rule of law created by this Court which is to be followed by lower courts in their analysis of whether "some educational benefit" has been provided, the family in ***Mrs. B.*** in the Second Circuit, and the family of J.C. in the Third Circuit are reimbursed for their heroic efforts to secure an appropriate education for their children; but, for indiscernible reasons, the family of Nicholas Clynes is forced to bear the brunt of their heroic efforts alone. By refusing to set a standard this Court has allowed for the provision of unequal justice and unequal education for Nicholas and those like him in the Eighth Circuit. Any family reading the Eighth Circuit's opinion in ***Clynes*** will think long and hard before removing their child to a private school; even if that child is angry, frustrated, acting out, and behaviorally disordered due to his failure to read, a failure the school district admits it does not know how to correct.

UNLIMITED DISCRETION
Different Circuits, Different Standards
Different Process, Different Results

The split in the circuits is strikingly borne out when the instant case of the Eighth Circuit, ***Ft. Zumwalt v. Clynes***, 119 F.3d 607 (8th Cir. 1997), is compared to ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 690 (1998). Both cases involve children with significant disabilities which affected them behaviorally and impacted upon their academic progress. In ***Cypress***, Michael had significant behavioral disorders and sporadic but significant episodes of violent outbursts. Id. at 247-253.

As a result of a fight that Michael got into with a girl in his class where he pinned her to floor with his knee and pulled out some of her hair, "Michael's parents perceived this incident as a serious escalation of Michael's behavioral problems and therefore renewed their previous consideration of alternative placements for Michael, including a residential psychiatric institution." Id. at 250-251. Michael's parents requested that the public school approve Michael's placement "and reimburse them for the cost of the placement." Id. at 251. The school district declined. Id.

Michael's parents sought review of the school district's denial of the request for reimbursement in an impartial due process hearing before the Texas Educational Agency. Id. The due process hearing officer conducted eleven days of hearing in April 1993 and, in a lengthy opinion, which the Fifth Circuit called "a carefully written decision," found for the parents. Id. at 251-252.

The school district appealed to district court and, after a one day hearing, that court reversed the due process hearing officer. As stated by the Fifth Circuit, the district court "did not

attempt to refute or discredit each of the hearing officer's findings in support of his conclusion that the school district's educational program for Michael was inappropriate." *Id.* at 253.

Strikingly, the Fifth Circuit affirmed the district court's rejection in toto of the due process hearing officer's lengthy, well reasoned, and well written opinion because the district court "must ultimately reach an independent decision based on a preponderance of the evidence. Accordingly, the district court's 'review' of a hearing officer's decision is 'virtually de novo.'" *Id.* at 252. The Eighth Circuit said just the opposite. In the instant case, the due process hearing panel in a two-to-one, cursory and equivocal opinion, denied reimbursement to the Clynes even as it recommended that the public school mimic the program of the private school that had worked so well for Nicholas. On appeal, the SLRO rejected the decision of the majority of the due process hearing panel in a lengthy and well-reasoned opinion. See, Pet. App. at 38 - 52. The district court analyzed the evidence in detail, point by point, and made numerous findings of fact, and after a one day hearing held that Nicholas had been denied FAPE and ordered reimbursement to the Clynes. ***Ft. Zumwalt v. Missouri State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). The district court found a denial of FAPE by relying on ***Rowley***. The Eighth Circuit reversed, relying on ***Rowley***. The district court and the dissent in the Eighth Circuit read ***Rowley*** one way and the majority read it another. Four federal judges read ***Rowley*** and divided equally as to what it meant. Some greater guidance is required, and not just in the Eighth Circuit.

There is no language in the Eighth Circuit opinion, like there is in the opinion of the Fifth Circuit, about the independent review authority of the district court. It is instructive that the Fifth

Circuit talks about the district court's review as being virtually de novo, while the Eighth Circuit relegates district court review to the point of formality.

The lengthy and well-reasoned opinion of the due process hearing officer in ***Michael*** was ignored by the district court. The district court was affirmed on appeal because it has unfettered, virtually de novo review authority in the Fifth Circuit. But, in the Eighth Circuit, it is unlawful for a district court to engage in de novo, independent review of the due process hearing officer.

Because this Court has created a vacuum in IDEA cases when it refused to draw lines in ***Rowley***, the situation arises that every person who has reviewed this case has cited to ***Rowley*** for support. The tally is four-to-four. The due process hearing panel denied reimbursement to the Clynes in a two-to-one opinion. The SLRO found that FAPE was not provided to Nicholas and ordered reimbursement. The district court judge agreed with the SLRO and ordered reimbursement to the Clynes. Two members of the Eighth Circuit panel found FAPE, while the third member of the panel dissented, finding that the district court was correct.

But it is not just a difference of analytical process between the Eighth and Fifth Circuits that warrants the grant of certiorari. A review of the following cases demonstrates that the vacuum created by ***Rowley*** has spawned myriad approaches throughout the circuits that foster result-oriented decision making, with the inevitable effect that outcomes in IDEA cases are unpredictable.

Another approach is that taken by the Fourth Circuit in ***Carter v. Florence County School District Four***, 950 F.2d 156 (4th Cir. 1991). This is also a reimbursement case and one in which this Court granted certiorari to resolve a conflict among the courts of appeal to determine only whether parental placement in a

private school cannot be proper under the IDEA unless the private school in question meets the standards of the state educational agency. ***Florence v. Carter***, 510 U.S. 7, 114 S.Ct. 361, 364 (1993). The Carters sought reimbursement for the private school tuition of their learning disabled daughter, Shannon. The public school had proposed an IEP for Shannon in which she would have remained in regular classes with two periods per day in the resource room. ***Carter***, 950 F.2d at 158-159. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead, her parents requested a learning disabilities itinerant program in which Shannon would receive individualized attention from a special education teacher. Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. Both the due process hearing officer and the SLRO rejected the argument of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education. Like the district court judge in the instant case, the district court in ***Carter*** reversed the due process hearing officer after a bench trial. The district court concluded that, although the school district did not breach the procedural requirements of the IDEA, it did fail to provide Shannon with FAPE. The district court found that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to "continue to fall behind her classmates at an alarming rate" and therefore "ensured the program's inadequacy from its inception." *Id.* The district court also found itinerant study of only three periods per week inadequate to "allow her to receive passing marks and advance from grade to grade." The district court also noted

the significant progress made by Shannon at her private school, Trident.

The district court's conclusions in ***Carter*** are similar to those of the district court in this case. After a bench trial, the district court found that Nicholas was unable to read when he left Ft. Zumwalt. The district court further found that Nicholas made significant progress at the Churchill School (the private school).

Strikingly, rather than reject the district court's reversal of both the due process hearing officer and the SLRO, as the Eighth Circuit would have done, the Fourth Circuit affirmed. The Fourth Circuit never used language that indicated the due process hearing officer was the state educational expert, to be deferred to in all instances. Rather, in affirming the district court, the Fourth Circuit in ***Carter*** stated yet another standard:

> "In light of these principles, we can not say that the district court's conclusion was clearly erroneous. The school district drafted the IEP to apply to a learning disabled tenth grade student whose reading and mathematics skills were at a fifth and sixth grade level, respectfully."

Carter, 950 F.2d at 160.

We now have three standards, all from different circuit courts citing ***Rowley*** as support. In the Eighth Circuit, the due process hearing officer is a state educational expert and any decision made by him or her is binding. In the Fifth Circuit, the district court need not and should not defer to the due process hearing officer, because the district court's independent determination is virtually de novo. In the Fourth Circuit, there is no deference to the due process hearing officer; but, there is no mention of independent review which is virtually de novo. The

district court's findings of fact and conclusions of law will be upheld unless "clearly erroneous." As noted by the dissent in the instant case, the clearly erroneous standard was rejected by the Eight Circuit majority. ***Ft. Zumwalt v. Clynes***, 119 F.3d at 617.

In the Ninth Circuit, the rule is that the district court reviews de novo the appropriateness of the special education placement. ***County of San Diego v. California Special Education Hearing Office***, 93 F.3d 1458, 1466 (9th Cir. 1996). The district court is free to accept or reject the findings of the due process hearing officer in part or in whole. *Id.* "At bottom, the court itself is free to determine independently how much weight to give the administrative findings in light of the enumerated factors." *Id.* Unlike the Eighth Circuit, in the Ninth Circuit the "district court's findings of facts are reviewed for clear error and its conclusions of law are reviewed de novo. . .. However, the district court's factual determination that a student is incapable in deriving educational benefit outside of a residential placement is reviewed for clear error." ***Seattle School District v. B.S.***, 82 F.3d 1493, 1499 (9th Cir. 1996).

In the instant case, both the SLRO and subsequently the district court judge examined in detail the cursory findings of the due process hearing panel and found a denial of FAPE. In a lengthy and detailed opinion, the district court judge found facts after hearing new evidence and painstakingly examining the record before him. ***Ft. Zumwalt v. Mo Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). In the Ninth Circuit, the district court judge would have had his findings reviewed for clear error. In the Eighth Circuit, the circuit court conducted a plenary, de novo review. The Clynes would have won in the Ninth Circuit, but lost in the Eighth Circuit.

In the Seventh Circuit, the district court's decision is reviewed to ascertain if there is a mistake of law. If there is not, then the district court's decision is reviewed under the clearly erroneous standard. ***Monticello School District No. 25 v. George L.***, 102 F.3d 895, 905 (7th Cir. 1996). If the Seventh Circuit's standard of review had been used here the Clynes would have won.

If the decision of whether FAPE was provided is a matter of fact, then a district court's independent review of the administrative decisions is reviewed for clear error. That is the rule in the Third Circuit. ***Carlisle Area School v. Scott***, 62 F.3d 520 (3rd Cir. 1995). Consequently, under that standard, much discretion is invested in the district court. In the Eighth Circuit, no discretion is vested in the district court, since the "ultimate decision" is reviewed de novo.

Because the analysis is so completely different between the Eighth and the other circuits, differences in result are inherent and unequal justice is the result. As noted by Justice Scalia, it is difficult to ascertain why we treat some of these questions as matter of fact and others as matters of law--"though I imagine that the relative importance to our liberties has much to do with it." *Scalia*, ***56 University of Chicago Law Review*** at 1182. It is the Clynes' hope that this Court will grant certiorari and declare that the question of FAPE is a matter of fact, not a matter of law. That district courts may engage in independent review that is virtually de novo, which is not to be reversed unless clearly erroneous. As noted, eight individuals have reviewed this case and the vote is split four-to-four. This is a result of the lack of guidance from this Court and an absence of a uniform rule of law. When there is no rule of law, any judge can reach any conclusion and cite ***Rowley*** for support.

Deference to SLRO

It is the process that determines the result. If the standards of review are different, then the result will be different. To whom deference is accorded is dispositive. In the Third Circuit, deference is to be accorded to the last state administrative officer that reviews under IDEA. That would be the SLRO in the instant case. In the Eighth Circuit, just the opposite is true. There is no deference given to the SLRO because the Eighth Circuit has concluded that the due process hearing panel's decision is supreme.

In ***Carlisle Area School v. Scott***, 62 F.3d 520 (3rd Cir. 1995), the Third Circuit determined that it was appropriate under the IDEA to defer to the State Level Reviewing Officer, except where the due process hearing panel made specific credibility based findings. ***Carlisle***, 62 F.3d at 528-529. However, even in regard to credibility determinations, the SLRO's determination is to be given deference if it involves record-supported credibility determinations. Id. And, as stated by the Sixth Circuit in ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618, 624 (6th Cir. 1990), "the only logical position under Rowley, and general principals of administrative law, is that federal courts are required to defer to the final decision of the state authorities, in this case that of the [SLRO]."

In the instant case, the SLRO noted that because the panel sits and hears the testimony of witnesses before it, great deference should be given to the manner in which it weighs the evidence. However, the SLRO further noted that in order to receive such deference "there must be some indication that [the panel] did in fact weigh the evidence." (App. 32-34). As the SLRO went on to state:

"In the present case the majority [of the due process hearing panel] rests its determination that Nicholas was making progress on his grade cards, special education progress notes, and the report of a private therapist who had worked with him. There is nothing to indicate what weight or consideration the majority gave to the seven witnesses who appeared before it. There is no indication that it evaluated the IEPs that had been prepared for Nicholas throughout the years. There is no indication that it considered the testimony that the district had given up on Nicholas. There is no indication that it evaluated the various tests and reports described in Nicholas's behavior. In addition, the law requires more than a finding that Nicholas was not regressing and was making some unquantifiable progress.

"The only place in the majority decision where there is evidence that it considered these other factors is in that part of the decision which recommends the involvement of the Churchill staff preparing the next IEP, that counseling support be provided and that one teacher manage Nicholas' education program. The inference to be drawn from these findings is, as parents argue, that the district had not met its responsibility to provide Nicholas an appropriate education."

(App. 32-34).

The majority of the Eighth Circuit stated that where

> "there is a conflict between the findings and conclusions of the hearing panel and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observations of witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators."

Ft. Zumwalt, 119 F.3d at 610. But, both the SLRO and the district court found that the majority of the due process hearing panel did not weigh the evidence. What the Eighth Circuit is really saying is that the district court and the SLRO are superfluous. It does so by elevating high school teachers on the due process panel to state educational experts. There is no support in the record for this pronouncement and no other court has ever made such a finding.

In the Third and Sixth Circuits there are definite standards. The final review officer of the state is the one to be deferred to, except in those situations where credibility based findings have been specifically and expressly made by the due process hearing officer. The district court opinion is reviewed for clear error because placement and appropriateness under the IDEA are factual questions.

The Eighth Circuit rules de novo on every question presented in an IDEA case deferring only to the so-called state educational experts on the due process panel. This is not only a split in the circuits, it is a recipe for unequal justice. The Clynes find it disquieting that where they live is more important in an IDEA case than the facts. It should not be the misfortune of Nicholas Clynes that his parents live in the Eighth Circuit.

The Clynes request that this Court issue its Writ of

Certiorari and declare that deference is to be paid to the SLRO, as is the rule in the Third and Sixth Circuits.

CONCLUSION

The Clynes respectfully request that this Court issue its Writ of Certiorari to the Eighth Circuit and vacate that court's decision and reinstate that of the district court which granted reimbursement to the Clynes upon a finding that FAPE had not been provided by the public school.

Respectfully Submitted,

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FORT ZUMWALT SCI'OOL DISTRICT, Plaintiff,

v.

MISSOURI STATE BOARD OF EDUCATION, et al.,
Defendants.

No. 4:93CV01710.
United States District Court,
E.D. Missouri.

May 1, 1996.
MEMORANDUM

GUNN, District Judge.

This matter is before the Court following a bench trial held on November 16, 1995.

***1219** Plaintiff Fort Zumwalt School District (the "District") filed suit against defendants Missouri State Board of Education and Robert and Ann Clynes, as Parents and Next Friends of Nicholas Clynes on July 29, 1993. Pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491%io, *plaintiff seeks judicial review of a decision by a State Level Review Officer ("SLRO") appointed by the Missouri State Board of Education. 20 U.S.C. § 1415(e)(2).*

On August 19, 1993 the Clynes filed a cross-appeal and a counterclaim against plaintiff seeking damages under IDEA; the Americans with Disabilities Act, 42 U.S.C. § 12132; 42 U.S.C. § 1983; and the Rehabilitation Act, 29 U.S.C. § 794. In an

Order dated October 11, 1994 this Court granted plaintiff's motion and dismissed the Clynes' counterclaim for failure to state a claim. *Fort Zumwalt School Dist. v. Missouri State Bd. of Educ.*, 865 F.Supp. 604, 607 (E.D.Mo.1994).

The parties later agreed that the Missouri State Board of Education was not an appropriate defendant, and the Court dismissed plaintiff's case against it on November 1, 1995.

I. FINDINGS OF FACT

1. Nicholas R. Clynes was born on March 24, 1981. (Exh. R-1 at 2.) At all relevant times, Nicholas and his natural parents, Robert and Ann Clynes, resided in the Fort Zumwalt School District. (Tr. at 4-6; Exh. R-1 at 5.)

2. Nicholas attended kindergarten at Hawthorn Elementary School in the Fort Zumwalt School District during the 1986-87 school year. (Tr. at 19-20.) (FN1) He attended and repeated first grade there during the 1987-88 and the 1988-89 school years. (Tr. at 27, 34.) He was promoted to second grade and then to third grade at Hawthorn for the 1989-90 and the 1990-91 school years respectively. (Tr. at 39, 43.)

3. Nicholas attended a summer session at a private school, the Churchill School, in 1991. (Tr. at 69.) He went on to attend the Churchill School during the school years of 1991-92 and 1992-93. (Tr. at 119-21, 135.)

4. The Churchill School is a private not-for-profit school

located in Ladue, Missouri. (Exh. P-30 at 1.) The school accepts and educates only children with learning disabilities. *Id.*

5. In kindergarten, Nicholas began to experience problems with his attitude and behavior. (Exhs. R-3, R-4.)

6. Later that year, Attention Deficit Disorder and hyperactivity were ruled out. (Tr. at 31.)

7. Nicholas was first evaluated by the District for learning disabilities in March of 1987. (Exh. R-1 at 6.) That preliminary evaluation led to more extensive testing in May of 1987. (Exh. R-3 at 1.) The District diagnosed Nicholas as being delayed in the areas of reading and math by one year or more. (Exh. R-3 at 6.) The parties do not dispute that Nicholas is learning disabled.

8. The District identified Nicholas' educational needs and recommended "highly structured individualized instruction in the areas of reading and math"; a "multi-modal approach to instruction"; and a "behavior modification program to provide additional structure and enhance task focus/completion skills." (Exh. R-4 at 2.)

9. The District developed an individual educational program (an "IEP") for Nicholas at that time which was to include 375 minutes per week of individualized special education in the Learning Disabled Resource Room ("LD Resource Room") at Hawthorn. (Exh. R-5 at 8.) The IEP also set objectives in areas of word attack skills, word recognition and comprehension, and numbers and computation. (Exh. R-5 at 4-7.) Nicholas was to

spend 21% of his time in the LD Resource Room and the rest in the general program for his grade level. (Exh. R-5 at 8.)

10. The IEP was implemented for the 1987-88 year. (Exh. R-6.) In January of *1220 1988, the District increased Nicholas' time in the LD Resource Room to 525 minutes per week. (Exh. R-7.) Nicholas thereafter spent 29% of his time at school each week in the LD Resource Room.

11. Despite glowing comments from his first grade instructors, in March of 1988 the District recommended that Nicholas be retained in first grade. (Exhs. R-8; Deft-AQ.)

12. In April of the same year, the Clynes and Nicholas began seeing Dr. Cheryl L. Nietfeldt, Ph.D., a psychologist. (Exhs. P-9, P-10.)

13. The Clynes worked with Dr. Nietfeldt to address Nicholas' attitude problems: Nicholas was feeling different from his peers, seemed to lack confidence, and was showing signs of depression and frustration. (Exhs. P-9, P-10, R-3, R-4.)

14. In May of 1988, the District again developed an IEP for Nicholas for the 1988-1989 school year. (Exh. R-11.) The IEP outlined 375 minutes in the LD Resource Room and set objectives in word recognition, reading comprehension, proofreading, and computation and application skills. (Exh. R-11 at 4-8.) Nicholas was to spend 21% of his time in the LD Resource Room and the rest in the general program for his grade level. (Exh. R-11 at 8.)

15. Nicholas seemed to do better academically during his second year as a first grader although his grades dropped during the last quarter of the year. (Exhs. Deft-AQ, Deft-AR.) He went from an A - in Math in the first quarter to a C in the last quarter. (Exh. Deft-AR at 112.) He went from an A - in Reading in the third quarter to a B - in the last quarter. *Id.* His Spelling grade dropped from a B in the first quarter to a C - in the last quarter. *Id.* His effort was ranked as satisfactory and at times, as outstanding. *Id.* His teacher Mr. Arnett commented on his fourth quarter performance: "Nick's grades dropped as the subject areas became more difficult, but I am still relatively pleased with his progress. He just needs to be more confident and not give up so easily." *Id.* at 113.

16. Mr. Arnett recognized in a report on Nicholas' behavior dated May 30, 1989 that: "Nick's biggest problem seems to be his attitude. While his disabilities are an obvious factor, his attitude is even more of a hindrance to his academic progress." (Exh. R-14 at 61.) Mr. Arnett recommended constant positive reinforcement, repetition, and redirection. *Id.*

17. In May of 1989, the District developed a IEP for Nicholas for his second grade year, the 1989-90 school year. (Exh. R-12.) The District recommended 300 minutes per week in the LD Resource Room, and the IEP outlined objectives in the areas of comprehension and word identification, writing skills, and computation. (Exh. R-12 at 3-6.) Nicholas was to spend 15% of his time in the LD Resource Room and the rest in the general program for his grade level. (Exh. R-12 at 6.)

18. At the start of his second grade year, in September, the District reevaluated Nicholas for learning disabilities. (Exh. R-15.) Test scores revealed that Nicholas' word attack skills, oral reading, and comprehension were all below grade level. *Id.* at 2. His writing was deemed below an age appropriate level. *Id.*

19. Nicholas' behavior evaluation at that time exposed "interpersonal difficulties, inappropriate behaviors, unhappiness and depression, and physical symptoms/fears." *Id.* at 5. Nicholas was described as "poorly motivated" and "easily frustrated." *Id.* at 7. The evaluation also noted Nicholas' chronic difficulties with feeling "different" from his peers. *Id.* at 1.

20. When Miss Ruhr, Nicholas's LD Resource Room instructor from his second year as a first grader through third grade, observed Nicholas during his English class in September of 1989, she noted that Nicholas was not reading along with the other children. (Exh. R-14 at 64-5.)

21. For the final quarter of his second grade year, Nicholas earned a C - in Math, D - in Reading, and a C in Spelling. (Exh. Deft-AS at 114.) His teacher Mrs. Porter commented: "In English, he rushes through his work and will many times turn in incomplete work." (Deft-AS at 115.) She recognized his weaknesses: "[Nicholas] is having ***1221** problems in math and reading.... [I]n reading he is having difficulty with comprehension and of course, word attack skills." *Id.*

22. In May of 1990, an IEP was developed for Nicholas'

upcoming third grade year. (Exh. R-18.) The IEP set objectives in word recognition and comprehension, language skills, and computation. (Exh. R-18 at 4-8.) The IEP allowed for 225 minutes per week in the LD Resource Room. (Exh. R-18 at 9.) Nicholas was to spend 13% of his time in the LD Resource Room and the rest in the general program for his grade level. (Exh. R-18 at 9.)

23. The IEP did not set any goals for word attack skills despite the fact that the District attributed Nicholas' weakness with word attack skills to his learning disability. (R. at 65.) The focus of the IEP was on comprehension and memorizing Dolch sight word lists.

24. The District reduced the amount of time in the LD Resource Room for the 1990-91 IEP because District staff felt that Nicholas was frustrated and embarrassed by being pulled out of the regular classroom and put in the LD Resource Room each day. (Tr. at 44.)

25. Nicholas did not receive a grade above a C during the 1990-91 school year. (Exh. Deft-AT.) He began the year with a C in Arithmetic, a C in Language, a D in Reading, and a C in Spelling. By the end of the year, Nicholas had failed Spelling and managed to raise a failing grade in Reading for the third quarter to a D for the final quarter. His other grades remained Cs and C - s. For every grade below a C, Nicholas' teacher Mrs. Styrk graded his corresponding effort as needing improvement.

26. Mrs. Styrk's written comments also criticized Nicholas'

efforts. After the second quarter, she wrote: "Nick can do fine work when he puts his mind to it. He needs to realize that his attitude is reflected in his grades." After the third quarter, she wrote: "The reading grade reflects his effort, not his ability." After the fourth quarter, Mrs. Styrk stated: "Nick needs to take more responsibility for his work. He needs to stop the excuses & just work! Sometimes I think he tries to manipulate us all!" *Id.*

27. Miss Ruhr and Mrs. Styrk filled out a report for the Churchill School on Nicholas in May of 1991. (Exh. P-5; Tr. at 282-85.) The teachers indicated that by the end of third grade Nicholas was not able to write in complete sentences or understand paragraph format and structure. (Exh. P-5 at 2.) They also reported that he did not understand the rules of capitalization or punctuation. *Id.* They explained that his reading level was "on-grade" and "low average" but that his phonics skills were weak and below grade level. *Id.* at 3. They commented: "At times, Nick does not put forth the effort to see continuing success. Often he appears to be apathetic about school."

28. The District recognized early on, in May of 1987, Nicholas had trouble learning with phonics. (Tr. at 289.) Nicholas, in fact, was most successful learning through visual, rather than auditory means. (Exh. R-3 at 12.) However, Miss Ruhr used phonics with Nicholas anyway because she thought that she should try it with him. (Tr. at 289.)

29. Miss Ruhr also used Dolch sight word lists with Nicholas; this method of teaching requires a student to learn to

recognize certain words on a list and to understand their meaning when used in sentences. (Tr. at 290-93.)

30. As far as decoding skills, Miss Ruhr agreed that the word attack goals set in IEPs for the years before third grade involved teaching Nicholas how to recognize certain consonants and then some diphthongs and digraphs and to break down words into recognizable parts. (Tr. at 292, 296.) However, Miss Ruhr indicated that for the years in question she focused her efforts with Nicholas on comprehension.

31. For Miss Ruhr: "[C]omprehension is what reading is all about." *Id.* at 292. She would ask Nicholas to read passages and then retell the story or details from the story. *Id.* at 291-92. She wanted Nicholas to be able to rephrase the main idea with his own words. *Id.* at 294. She expected him to read by using his "sight vocabulary skills." *Id.* at 296. She also taught him to use ***1222** "context clues" to determine an unknown word. *Id.* at 295.

32. Miss Ruhr testified before this Court that Nicholas was reading at grade level when he left Hawthorn. (R. at 70.) However, according to documentation, after conducting standardized testing of Nicholas at the end of his third-grade year, Miss Ruhr concluded that Nicholas' total reading skills were at a second-grade level; Nicholas' word comprehension skills were the only ones near grade-level. (Exh. Deft-CN; R. at 51.)

33. In September of 1989, Nicholas' word attack skills were

at a first-grade level. (Exh. Deft-CN.) By May of 1991 his word attack skills had hardly improved; they were still at a first-grade level. *Id.*

34. Nicholas' test scores are consistent with Miss Ruhr's testimony regarding her own teaching methods. Miss Ruhr was successful at teaching Nicholas how to figure out stories in books by looking at pictures and recognizing three letter words by sight, but she did not teach him how to decode and read new words.

35. Reading requires both comprehension and word attack skills. (R-29 at 152, Woodcock Reading Mastery Tests Revised.)

36. When Nicholas entered the 1991 summer session at Churchill School, he could not read words that were new to him. (Tr. at 60, 198; R. at 85; Exh. PS-1.) He did not know his ABC's, the days of the week, or the months of the year. (Tr. at 115; Exh. PS-3.)

37. Nicholas could identify three-letter consonant-vowel-consonant words, and he could use sighted words to garner the meaning of passages. (Tr. at 214, 228.) That is, he could recognize words that he memorized, words from the Dolch sight word lists, as one would recognize a picture or a drawing but he had no way of figuring out a word that he had not seen before. *Id.* at 228-30. Nicholas therefore exhibited strength in the area of comprehension but serious weakness with word attack skills consistent with his learning disabilities. (Exhs. Deft-CN, P-17,

PS-1, R-9.)

38. Nicholas' performance in school had declined from first to third grade because it became harder and harder for him to memorize and retain the growing vocabulary he needed to pass his classes. (Tr. at 228-30.)

39. Mrs. Burke, the District's own psychological examiner, has admitted that tests showed that Nicholas was not reading at grade level when he left Hawthorn. (Tr. at 242; R. at 66.)

40. In May of 1991, the District drafted an IEP for the 1991-92 school year. The IEP set objectives in word recognition and comprehension, language skills, word attack skills, writing skills, spelling, multiplication and fractions, and computation. (Exh. R-22 at 3-14.) The IEP included 525 minutes per week in the LD Resource Room. (Exh. R-22 at 15.) Nicholas was to spend 26% of his time in the LD Resource Room and the rest in the general program for his grade level. (Exh. R-22 at 15.)

41. The 1991-92 IEP did set goals for word attack skills which focused on learning to recognize prefixes and suffixes. However, Miss Ruhr testified that she would have worked with Nicholas to "to increase his vocabulary" of sighted words. (Tr. at 296.)

42. At the IEP meeting, Mrs. Clynes questioned the District's efforts at educating her son and informed District staff that her son would be attending the Summer Session at the Churchill School. (Tr. at 69.) Miss Ruhr told her that she did not know

what else to do for Nicholas, and she blamed Nicholas' attitude for his lack of progress. *Id.* at 70. According to Miss Ruhr, Nicholas had chosen to not learn. *Id.*

43. When Mrs. Clynes called Mrs. Moore, the Director of Special Education for the District, to discuss her concerns over the May, 1991 test scores and the IEP conference, Mrs. Moore told her that there are some children who are just "non-readers" despite the District's efforts. *Id.* at 72.

44. Nicholas attended a summer program at Churchill School in 1991. At that time, Nicholas had not been assured placement for the 1991-92 school year at Churchill. (Tr. at 68-69; Exh. R-23.)

45. The District never recommended a summer program for Nicholas. (Tr. at 49, 97.) Although, at the end of third grade, ***1223** Miss Ruhr did recommend that Nick work on his own during the summer to ensure that he retained what he learned that year. (Exh. R-20 at 4.)

46. The Churchill School takes a remedial approach to learning. (Tr. at 190.) The school's programs focus on teaching a student how to learn, rather than teaching a student content. *Id.* at 190-191. For example, according to Mr. Brubaker, a former Assistant Director of the school: "We are teaching a kid how to spell 'zebra' instead of what it is." *Id.* at 191.

47. The centerpiece of the Churchill School's educational program is the tutorial. (Tr. at 192.) The tutorial involves one-

on-one instruction for 15% to 20% of a student's day. Classes outside the tutorial focus on practicing what students learn in their tutorial sessions.

48. The classes may have seven students and one teacher. However, the student gets a great deal of one-on-one attention because students are doing different things from one another in class; the classes do not involve teachers lecturing and questioning students on specific material. (Tr. at 235-36.) The tutorial teacher directs what a student learns in the other classes rather than the tutorial material just supporting regular class work. (Tr. at 192, 236-37.)

49. The Churchill School also offers a demystification program. (Tr. at 215.) Through the program, each student learns to understand and accept her specific learning disability. *Id.* at 216.

50. The student-teacher ratio at the Churchill School is approximately three to one. (Tr. at 191.)

51. At the conclusion of the 1991 Summer term, Churchill School notified the Clynes that a place had opened up for Nicholas at the School for the 1991-92 school year and that Nicholas would be given that place because he successfully completed the summer program. (Exh. P-24.)

52. In a letter dated August 2, 1991 the Clynes informed Hawthorn School that Nicholas would not be attending that fall. (Exh. P-24 at 1.) The Clynes expressed regret over District

staff's inability to address Nicholas' problems despite the efforts of the Clynes to work with the District. *Id.*

53. At the Churchill School, Nicholas' attitude and self-esteem improved as did his reading skills. (Tr. at 125-30, 208, 212, 214.) As Nicholas made academic progress and as his word attack skills improved, his attitude, his willingness to meet new challenges, and his self-esteem improved. (R. at 97-98, Test. of Mrs. Gilligan, Director of the Churchill School; Exh. R-25.)

54. Nicholas benefitted from the Churchill School's demystification program. (Tr. at 216.) He earned a role in a school play about learning disabilities. *Id.* at 216-17.

55. The self-contained environment of the Churchill School also proved beneficial to Nicholas' emotional growth; he did not feel "different" from his peers. (Tr. at 219.) At Hawthorn, Nicholas' emotional progress was stunted by his frustration over being pulled out of normal classes and put in the LD Resource Room each day. *Id.*

56. In reports to the District gathered for a September 2, 1992 reevaluation, the Churchill teachers described Nicholas as having "good behavior" and as not being a "problem student." (Exh. R-25.) The Churchill teachers recognized that Nicholas would become exasperated with himself when presented with new material. *Id.* Ms. Fahsl, his tutorial instructor, wrote: "Nick comes to class very organized. He promptly gets all materials and homework ready. He stays focused most of

class.... He gets very frustrated and angry with himself when a mistake is made in his work. His attitude quickly changes if you bring it to his attention." *Id.* at 134. Ms. Blair, Nicholas' math teacher, commented: "When presented with a new learning situation, he frequently feels he will be unable to 'get it.' His automatic response is to shut down and withdraw, or express anger." *Id.* at 136. Nicholas required "prompt[ing]" to ask for help, according to his auditory-visual instructor, Ms. Brotherton. *Id.* at 138.

57. Tests administered by the District for the September, 1992 revaluation showed improvement in Nicholas' word attack skills. (Exh. R-29 at 152.)

***1224** 58. Tests administered by the Churchill School also revealed progress with word attack skills. (Exh. R-33 at 163.)

59. Grade reports from the 1991 Summer Session, the 1991-92 school year, and the 1992-93 school all indicate that Nicholas was making progress with his reading and math. (Exhs. P-4, Deft-A, Deft-B.) The Churchill School quarterly reports are detailed. The School does not award grades but instead ranks a student's progress and effort towards specific goals set each quarter with "excellent," "satisfactory," or "needs improvement."

60. The 1991 Summer Session report indicates success with positive reinforcement to maintain motivation, reinforcement of appropriate behaviors after being corrected, and with allowing Nicholas to help other students to increase confidence. (Exh. P-4.)

61. The report also describes effective techniques for learning employed with Nicholas, including a linguistic approach to reading and spelling, devices to aid Nicholas in remembering spelling and sequential skills, and proofreading for one item at a time. *Id.* All of Nicholas' marks are "satisfactory" or "excellent" for that summer. *Id.*

62. In September of 1991, standardized test results indicated that Nicholas' reading skills ranked in the 2nd to 9th percentile. (Exh. Deft-C at 40.) The same tests administered in May of 1992, after a year at the Churchill School, showed a rise in the ranking of Nicholas' reading skills to a range between the 12th and 54th percentile. *Id.* Nicholas' rank in word attack skills jumped from the 2nd percentile to the 25th percentile. *Id.*

63. Nicholas achieved this success through a program used by the Churchill School called "Let's Read." (Tr. at 192.) The program involves a linguistic approach to reading and employs a multi-sensory method. *Id.* A teacher must receive special training to learn how to use the "Let's Read" program as well as many of the other methods of teaching used at the Churchill School. (Tr. at 234.)

64. Nicholas' quarterly reports for the 1991-92 school year also document improvement with "satisfactory" progress noted throughout the year in Language Arts and "excellent" progress noted by the fourth quarter in Math. (Exh. Deft-B at 26-29.) He made strides during the year towards understanding capitalization and punctuation, as well as long division. *Id.* His note taking and proofreading skills and his grasp of sequencing

also improved. *Id.* at 30-32.

65. In May of 1992, the Clynes and the District attempted to develop an IEP for the 1992-93 school year; however, the IEP was not completed at that time. (Exh. R-35.)

66. The Clynes were never offered an opportunity to participate in making an IEP by the District. (Tr. at 64.) When they would come to the IEP conferences, the IEPs were already completed. *Id.* The Clynes did not understand that they could accept or reject an IEP; they thought that by signing the IEP they were acknowledging their attendance and not their acceptance. *Id.* at 152. They realized when Nicholas was in third grade that they were supposed to participate in creating the IEP, and they would not sign and accept the IEP developed in May of 1991 for Nicholas' fourth-grade year. *Id.*

67. In October of 1992, the District drafted an IEP for the 1992-93 school year. The IEP set objectives in decoding, vocabulary, comprehension, written expression, word problems, multiplication and division, decimals, fractions, and study skills. (Exh. R-37 at 5-16.) The IEP recommended that Nicholas spend 1050 minutes per week in the LD Resource Room. *Id.* at 17. Nicholas was to spend 58% of his time in the LD Resource Room and the rest in the general program for his grade level. *Id.* The general program classes would include physical education, music, and a library program. *Id.*

68. An assessment of Nicholas' skill level at that time noted positive advances in Nicholas' acceptance and understanding of

his learning disability and in the areas of reading and writing. (Exh. R-36 at 168-71.)

69. A staffing report by the District in October of 1992 states that Nicholas experienced "significant academic growth" during the 1992-93 year. (Exhs. R-32, R-34.) According ***1225** to the report, teacher observations indicated "emotional growth," specifically in the areas of "self-concept, task completion, task initiation, and the development of coping mechanisms to deal with frustration." (Exh. R-34 at 164.)

70. The District's 1992-93 October IEP did not offer a tutorial program where one teacher would manage Nicholas' curriculum and work. (Tr. at 217-18.)

71. The 1992-93 IEP also did not have an auditory visual component. (Tr. at 217-18.)

72. The IEP did not include a program designed to help Nicholas recognize and accept his learning disabilities. (Exh. R-37.)

73. There is no evidence that the District staff would have changed their methods of educating Nicholas. There is no evidence that they would have used a linguistic approach to addressing Nicholas' word attack skills.

74. The 1992-93 IEP offered a "self-contained" learning disabilities classroom. (Tr. at 259.) The District considered a self-contained program the most appropriate offering for

Nicholas. *Id.* at 300. The program was called self-contained because Nicholas would spend in excess of three hours per day in the LD Resource Room in the company of other children with learning disabilities. *Id.* at 259-60.

75. Hawthorn only has one classroom which serves as the LD Resource Room and a self-contained classroom.

76. Hawthorn was not able to offer a self-contained classroom to any students until the 1992-93 school year. (Tr. at 321.) Prior to that students were sent to the District's Dardenne School for self-contained programs. *Id.*

77. Until the 1992-93 school year, the District had never offered a "self-contained" classroom for Nicholas at either Hawthorn or Dardenne. *Id.* at 97-98, 301.

78. The self-contained program outlined in the 1992-93 IEP involved the LD Resource teacher observing Nicholas' work and administering tests to him. (Exh. R-27.) This differs from the programs offered to Nicholas prior to the 1992-93 school year.

79. Under those earlier programs Miss Ruhr worked with Nicholas to achieve the IEP goals but did not have any involvement in his regular curriculum. Miss Ruhr would speak to the regular classroom teachers each week to find out which skills would be covered in the upcoming week. (Tr. at 283-84.) She did not routinely monitor Nicholas' work in the regular classroom. *Id.* 285.

80. Miss Ruhr taught from 13 to 24 students during the relevant years. *Id.* at 303. She asserts that she worked with Nicholas in groups of three or one on one. *Id.*

81. The District has admitted that it does not have a program similar to the Churchill School program. (Tr. at 272.)

82. Furthermore, Mrs. Burke testified before this Court that the 1992-93 IEP does not incorporate the Churchill School program. (Tr. at 52.)

83. While Churchill School staff attended the October 1992 IEP meeting, the District relied on them only to garner Nicholas' current skill levels. *Id.*

84. In a letter to Dr. DuBray, the District's Superintendent, dated August 6, 1992, the Clynes detail the expenses associated with the Churchill School and seek reimbursement. (Exh. P-23.) They also describe their frustration with the District and how they felt the District failed them and Nicholas. *Id.*

85. Their request was denied by Dr. DuBray in a letter dated August 18, 1992 although Dr. DuBray offered to meet with the Clynes and discuss Nicholas' situation. (Exh. R-27.)

86. Nicholas' quarterly reports for the 1992-93 school year reveal progress towards goals in syllabication, writing, and spelling. (Exh. Deft-A at 2-4.) He made satisfactory progress towards mastering long division and learning fractions. *Id.* at 6.

87. After the IEP for the 1992-93 school year was completed, the Clynes requested a due process hearing in a letter to Dr. DuBray dated November 5, 1992. (Exh. R-40.)

88. After conducting a hearing on February 1, 1993 a divided three-person panel ***1226** found 2 to 1 in favor of the District on February 26, 1993. (Panel Decision.)

89. The majority found that Nicholas was not regressing while he attended Hawthorn. They found that the programs implemented at Churchill School could have been implemented at Hawthorn. (Panel Decision at 2, 5.)

90. They criticized the Clynes for "unilaterally" withdrawing Nicholas from the District for the 1991-92 school year without giving the District an opportunity to review the IEP for that year in light of Nicholas' experiences at the Churchill School over the summer. (Panel Decision at 5-6.)

91. They recognized that Nicholas made progress at Churchill School but found that Nicholas' learning disabilities were not severe enough to warrant the Churchill School's segregated environment. (Panel Decision at 2-4.)

92. The majority recommended that the District develop an IEP by working with the Churchill School and by having one teacher manage an educational program for Nicholas which would include positive reinforcement and an auditory-visual approach to instruction. The majority also recommended against the use of a cost-response behavior management system. (Panel

Decision at 5.)

93. The majority focused on whether Nicholas regressed while at Hawthorn and not on whether Nicholas benefitted from the educational program designed for him at Hawthorn. Based on a finding of no regression, the majority found that the District's IEPs for Nicholas were "appropriate" although not the best. (Panel Decision at 4.)

94. The dissenting panel member found that the District had not offered Nicholas a "free appropriate public education." She cited a number of failings on the District's part. She found that the District had failed: (1) to recognize the extent of Nicholas' learning disabilities and the related behavior concerns; (2) to provide a "highly structured small class setting for total instructional needs;" (3) to address through the IEP process behavioral concerns; (4) to provide "in-school counseling for social and educational needs;" (5) to provide "sufficient special education services to meet student needs in acquiring mastery of basics;" and (6) to give parents with an opportunity to help develop the IEPs. (Panel Decision at 11.)

95. The Clynes appealed the panel's decision on March 25, 1993. After briefing and oral argument, the state-level review officer ("SLRO") issued his decision on June 29, 1993.

96. The SLRO reversed the panel decision. (SLRO decision at 13-14.)

97. The SLRO found that the District had not offered

Nicholas a "free appropriate public education" for the 1991-92 school year. *Id.* The SLRO criticized the District for its "hit and miss approach to dealing with [Nicholas'] failures" and for failing to address Nicholas' attitude problems. *Id.* at 14. The SLRO wrote:

> There was no focused effort to follow up on failures and to produce a plan of progress that could be clearly demonstrated. The District is not under any obligation to make Nicholas an honor student, however it should demonstrate that it has identified the problem areas, applied the appropriate resources and has either produced satisfactory results or has an explanation why the student's performance is the best that can be expected from him.

Id. at 14-5.

98. The SLRO found that Nicholas made progress at the Churchill School: "Emotional and physical problems have been brought under control and there has been a marked improvement in his academic performance." *Id.* at 6.

99. The SLRO also concluded that the District was willing to offer Nicholas everything offered by Churchill School for the 1992-93 school year. *Id.* at 15.

100. The SLRO ordered the District to reimburse the Clynes for tuition and transportation costs associated with the 1991-92 school year at Churchill School. *Id.* at 14.

101. The SLRO awarded the cost of the 1991 Summer Session at Churchill School because he found that the summer program was a prerequisite for the 1991-92 school year. *Id.*

*1227 102. The SLRO also awarded tuition and travel costs associated with the first semester of the 1992-93 school year because the District did not offer an appropriate education to Nicholas until October, 1992, after the start of that school year. *Id.* at 15. He stated that if the Clynes could demonstrate that they had to prepay, without a right of refund, for the whole year at Churchill School, then he would award reimbursement through the end of the 1992-93 school year. *Id.*

103. The SLRO set the cost of travel at the rate of twenty-eight cents per mile. *Id.*

104. Tuition and travel costs are as follows:

Tuition	
Summer Session, 1991	$3,000.00
School Year, 1991"92	$13,660.00
School Year, 1992"93	$14,300.00
Travel Costs	
Summer Session, 1991	$814.00
School Year, 1991"92	$3,918.00
School Year, 1992"93	$3,918.00

	Total: $39,610.00

(Submissions from Defs. Received November 27, 1996 at

1, 2, 4, 6, 8.)

105. In the contract which the Clynes entered into with the Churchill School, the Clynes agreed that: "The obligation to pay the tuition for the full academic year is unconditional and no portion of such tuition so paid or outstanding will be refunded or canceled notwithstanding the subsequent absence or withdrawal from the School of [Nicholas]." (Submissions from Defs. Received November 27, 1996 at 7.)

106. The payment schedule sent to the Clynes for the 1992-93 school year acknowledges that "any exception" to the policy must be approved in writing by the Treasurer of the Board of Trustees for the Churchill School. (*Id.* at 6; Brubaker Aff.Exh. 4 at pp 1-3.)

107. The Clynes also incurred $5,934.00 in interest payments on a $42,000 loan that they took out to pay tuition costs. (Submissions from Defs. Received November 27, 1996 at 1, 10-11.)

108. The District now appeals the SLRO's decision awarding reimbursement for the 1991-92 and the 1992-93 school years.

109. The Clynes cross-appeal the SLRO's finding that the District was "ready, willing and able to provide Nicholas anything the Churchill School had to offer" for the 1992-93 school year.

110. As of the 1995-96 school year, the Churchill School has placed Nicholas in a transitional program to prepare him to go back to the District and to be educated with nondisabled students. (R. at 88.)

II. Conclusions of Law

111. Under IDEA, states receiving certain federal funds must provide a "free appropriate public education" to all children with disabilities. 20 U.S.C. § 1412(1). Both sides agree that Nicholas is disabled, and neither plaintiff nor defendants contest the applicability of IDEA in this case. *See supra* ¶ 7.

112. A "free appropriate public education" is defined as:

"special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18). "Special education" includes

instruction in the classroom, home, hospital, institution, and in "other settings." *Id.* at § 1401(a)(16). "Related services" include, among other things, transportation and psychological services, and medical services for diagnostic and evaluative purposes. *Id.* at § 1401(a)(17).

113. "Transportation" includes travel to and from school. 34 C.F.R. 300.16(b)(14)(i).

***1228** 114. IDEA requires that parents and school district representatives develop an IEP for each disabled child. 20 U.S.C. § 1414(a)(5). Each IEP must include: a statement of the child's present levels of educational performance; a statement of annual goals, including short-term instructional objectives; a statement of the specific educational services to be provided and the extent to which the child will be able to participate in regular educational programs; and the projected dates for initiation and cessation of the services. 20 U.S.C. § 1401(a)(20)(A), (B), (C), (E), (F) (In 1990, Congress added an additional IEP requirement regarding transitional services. 20 U.S.C. § 1401(a)(20)(D).)

115. Parents wanting to challenge the placement of their child are entitled to a due process hearing which may be conducted by a local educational agency or intermediate educational unit as determined by state law or the state educational agency. 20 U.S.C. § 1415(b)(2). In Missouri, a due process hearing is conducted by a three-person panel empowered by the District's Board of Education. Mo.Rev.Stat. § 162.961.

116. Any party "aggrieved by the findings and decision

rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing." 20 U.S.C. § 1415(c). In Missouri, the appeal is to the State Board of Education; the Board designates a state-level review officer to handle the case. Mo.Rev.Stat. § 162.962; State Plan for Part B of the Individuals with Disabilities Act at 40 (1994).

117. Any party aggrieved by the state agency's review of the hearing may file suit in federal court. 20 U.S.C. § 1415(e)(2). "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.*

[1] 118. Such relief includes retroactive reimbursement to parents. *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 2003, 85 L.Ed.2d 385 (1985); *Rapid City Sch. Dist. v. Vahle*, 922 F.2d 476, 478 (8th Cir.1990). Parents do not waive any right to reimbursement if they unilaterally obtain substitute care for their child. *Burlington*, 471 U.S. at 372, 105 S.Ct. at 2004; *Rapid City*, 922 F.2d at 478.

119. However, parents must give the school district notice that they want to place their child in another school. *Rapid City*, 922 F.2d at 478; *Evans v. District No. 17*, 841 F.2d 824, 831 (8th Cir.1988). Otherwise, the school district would not have an "opportunity to make (or refuse to make) changes because the parents unilaterally removed their child from the school district."

Evans, 841 F.2d at 831.

120. In this case, the Clynes worked closely with the District and gave the District notice that they wanted to place their child in another school. *See supra* pp 42-43, 52, 84. In Spring of 1991, the Clynes expressed dissatisfaction with their son's progress but were told by District staff that there was nothing more that could be done with their son; the District refused to initiate a change of any kind other than to increase Nicholas' time in the LD Resource Room and to continue focusing on sight vocabulary skills. *See supra* pp 40-43, 45, 77. In their letter to Mrs. Wiig, the Principal at Hawthorn, dated August 2, 1991, the Clynes make clear their impression that the District was unwilling to do anything other than what it offered to do in the 1991 IEP. *See supra* ¶ 52.

[2] 121. Where parents place their child in a private school, they are entitled to reimbursement only if the court finds that: (1) the school district did not offer a free appropriate education to their child; and (2) the private school placement was proper under IDEA. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, ----, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993).

[3] 122. Whether a free public education is "appropriate" depends upon whether the education is "sufficient to confer some educational benefit upon the handicapped child." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). The child's grades, ***1229** test scores, and advancements from one grade level to the next are important evidence for the court to consider in assessing

whether the child has benefitted from her education. *Id.*

[4] 123. The district court shall base its decision on the preponderance of the evidence. *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051. However, the court shall give "due weight" to the administrative decisions below. *Id.*

[5] 124. In this case, as appellant, the District bears the burden of proof in showing that the SLRO's decision should be reversed on the issues of travel costs and tuition reimbursement for the 1991-92 and 1992-93 school years. *Yankton School Dist. v. Schramm*, 900 F.Supp. 1182, 1186 (D.S.D.1995). Similarly, the Clynes bear the burden of proof on whether the SLRO wrongly found that the District was "ready, willing and able to provide to Nicholas anything the Churchill School had to offer" for the 1992-93 school year. *Id.*

[6] 125. The Court notes that reimbursement is not barred by a private school's failure to meet state education standards. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. at ----, 114 S.Ct. at 365.

[7] 126. Initially, the Court concludes that Nicholas' placement at the Churchill School was proper under the IDEA for both the 1991-92 and 1992-93 school years. Nicholas made progress at the Churchill School academically and emotionally. *See supra* pp 53-64, 68-69, 86. The segregated environment was appropriate for Nicholas for the years at issue in this case. Even the Due Process Panel members who found for the District below endorsed the Churchill School program. *See supra* ¶ 91-

[8] 127. It is true that IDEA favors placement to the maximum extent possible with other students who are not learning disabled. 20 U.S.C. § 1412(5). That "preference, however, is not absolute." *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir.1987). IDEA allows for self-contained placement "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5). Mainstreaming is not appropriate where it would not benefit the child. *French v. Omaha Public Schools*, 766 F.Supp. 765, 784 (D.Neb.1991).

128. In this case, mainstreaming was not appropriate for Nicholas during the 1992-93 school year because of the nature of Nicholas' learning disabilities. Nicholas would not have benefitted from mainstreaming. The evidence shows that Nicholas' self-esteem and behavior were aggravated by his associations with students from whom he felt "different" and that consequently, his academic progress was hindered. *See supra* pp 5, 12-13, 16, 19, 24, 53, 55-56, 60.

129. Furthermore, the Court agrees with the SLRO's finding that the District did not offer Nicholas a "free appropriate public education" from 1991-92. *See supra* ¶ 97. Nicholas did not receive sufficient education benefit from the District's programs.

130. Nicholas did advance from one grade to the next after the 1988-89 school year and passed many of his classes. *See*

supra pp 2, 15, 21, 25. However, Nicholas repeated first grade and test scores showed that his reading skills remained below grade level at the end of his third grade year. *See supra* pp 11, 32-33, 39. Also, he could not write a complete sentence when he entered the Churchill School. *See supra* pp 27. Perhaps most disturbing, Nicholas' word attack skills never advanced past a first grade level while he attended Hawthorn. *See supra* ¶ 33.

131. The District did not change its methods for teaching Nicholas and did not consider changing his placement even after those methods proved unsuccessful. *See supra* pp 18-21, 27-39. The third grade IEP did not even set goals for word attack skills. *See supra* pp 22-23. Faced with poor test scores in May of 1991 and declining grades, the District merely increased Nicholas' time in the LD Resource Room after decreasing it each year. *See supra* pp 10, 14, 17, 22, 40.

132. While the IEP for the 1991-92 school year did set goals in word attack skills, Nicholas' teacher stated that she ***1230** would have continued to focus on Nicholas' vocabulary of "sighted words." *See supra* at ¶ 41. By failing to address Nicholas' serious decoding problems, the District failed to address adequately Nicholas' learning disability. *See supra* pp 23, 28-38, 41.

133. The District also did not deal with Nicholas' problems with frustration and low self-esteem. District staff blamed Nicholas for their own failures. *See supra* pp 26-27, 42-43. They accused Nicholas of giving up on himself when they had given up on Nicholas. *Id.* Nicholas' teachers during second and

third grade and District officials ignored the advice of Mr. Arnett, Nicholas' first grade teacher during the 1988-89 school year. Mr. Arnett recognized early on the Nicholas could make progress with learning and overcome his lack of confidence with positive reinforcement, repetition, and redirection. *See supra* ¶ 16.

134. Nicholas went from spending 26% of his time in the LD Resource Room during his second year as a first grader to spending only 13% of his time in the LD Resource Room during his third grade year. *See supra* pp 10, 14, 17, 22. The District recognized that Nicholas did not want to feel "different" and so it allowed him to spend more time in the normal classroom. *See supra* pp 5, 12-13, 19, 24. The District did not help Nicholas to understand and accept his learning disabilities; instead, its teachers increased the amount of time that Nicholas spent with non-disabled students, the very people from whom Nicholas felt "different." *Id.* The result was detrimental to Nicholas' academic and emotional growth.

135. In light of the foregoing, the Court will affirm the SLRO's decision to award reimbursement of tuition and travel costs to the Clynes for the 1991-92 school year.

[9] 136. The Court will affirm the SLRO's decision to award the Clynes tuition and travel costs for the 1992-93 school year as well.

137. An IEP was not developed until October of 1992 for the 1992-93 school year. *See supra* ¶ 67. By the time the 1992-

93 IEP was developed, Nicholas had already entered the Churchill School for the year and the Clynes had signed a contract with the Churchill School. *See supra* pp 102, 105. The contract unambiguously obligated the Clynes to pay the tuition in full for the 1992-93 school year; the contract did not entitle the Clynes to any relief from that obligation if they withdrew their son from the Churchill School in October, 1992. *See supra* ¶ 105.

137. The District makes much of evidence suggesting that the Churchill School may have agreed to release other parents from their payment obligations in the past. *See supra* ¶ 106. The Court is not impressed by such evidence; indeed, "[i]t is well settled that a party may waive any conditions of a contract in his favor." *Koedding v. Slaughter*, 634 F.2d 1095, 1097 (8th Cir.1980) (citing *Campbell v. Richards*, 352 Mo. 272, 176 S.W.2d 504, 504 (1944)). The District has not cited any support for holding that the Clynes should not be reimbursed because they failed to try and "get out" of a valid, unambiguous contract. Therefore, the Court will affirm the SLRO's decision to allow reimbursement for the whole 1992-93 year based on unambiguous contract between the Clynes and the Churchill School.

[10] 138. The Court further finds that the SLRO erred in finding that the District was "ready, willing and able to provide to Nicholas anything the Churchill School had to offer" for the 1992-93 school year. The evidence and administrative record does not support such a finding. *See supra* pp 46-50, 67, 70-75, 78, 81-82.

139. The District did not offer Nicholas an appropriate education for the 1992-93 school year as well.

140. The District did offer to place Nicholas in "self-contained" classroom for the 1992-93 school year. *See supra* ¶ 74. However, the District did not offer a tutorial program with one teacher managing Nicholas' curriculum, an auditory-visual program, a linguistic method for teaching Nicholas reading skills, or a program designed to help Nicholas recognize and accept his learning disabilities. *See supra* pp 67, 70-72. The District did not offer to retrain its teachers to use the Churchill School's teaching methods with Nicholas. *See supra* pp 63, 67, 70-73. ***1231.** The program offered in the 1992-93 IEP would have put Nicholas in an environment not conducive to study--a combined Resource Room and self-contained classroom where as many as 24 students would be coming in and out of the room at various times throughout the day to receive tutoring. *See supra* 74-75, 80.

141. Additionally, the District did not offer Nicholas a totally segregated environment. *See supra* ¶ 67. According to the 1992-93 IEP, Nicholas would participate in certain mainstream classes: physical education, music and a library program. *Id.* As discussed above, a totally segregated environment was the only appropriate environment for Nicholas during the 1991-92 and 1992-93 school years. *See supra* ¶ 126.

III. Conclusion

142. The SLRO's decision is affirmed in part and reversed

in part. The Court affirms the SLRO's findings and award of reimbursement for the 1991-92 school year. The Court reverses the SLRO's finding that the District offered Nicholas everything provided to Nicholas by the Churchill School for the 1992-93 school year and finds that the District failed to offer Nicholas a free, appropriate education in accordance with IDEA for the 1992-93 school year.

143. Because the Court finds that the District failed to offer Nicholas a free, appropriate education for the 1991-92 and 1992-93 school years and because the Court finds that the Churchill School constituted an appropriate placement under IDEA for Nicholas for those same years, the Court will enter judgment in favor of the Clynes and against the District. The Court will award reimbursement for tuition and travel costs in the amount of $39,610.00. *See supra* ¶ 104.

[11] 144. IDEA does not provide for reimbursement of interest payments on the loan which the Clynes took out to pay for Nicholas' education at the Churchill School. *See supra* ¶ 112. Therefore, the Court will not award any sum reflecting the interest payments. *See supra* ¶ 107.

145. Although the Court affirms the SLRO's decision to award reimbursement for the 1992-93 school year based on the contract between the Clynes and the Churchill School for that year, the Court is awarding reimbursement for the 1992-93 school year based on its independent finding that the District did not offer a free, appropriate education to Nicholas for that year. The Court considers its affirmance of the SLRO's decision on the

contract issue to be an alte .native justification for the relief awarded in this case.

FN1. "Tr." designates the transcript of proceedings held on February 1, 1993 before the Due Process Hearing Panel. *See infra* pp 87-88. "R." designates the transcript of proceedings held before this Court.

DEPARTMENT OF EI EMENTARY AND SECONDARY EDUCATION
STATE OF MISSOURI

In the Matter of

ANN AND ROBERT CLYNES on behalf of NICHOLAS CLYNES,
Appellants,

v.

FORT ZUMWALT SCHOOL DISTRICT,
Respondent.

DECISION OF STATE LEVEL REVIEW OFFICER

This is an administrative review of a hearing panel decision involving the placement of Nicholas Clynes. A three member panel heard this matter on February 1 1993. On February 10, 1993 by a 2-1 vote, the panel issued an order in favor of the Fort Zumwalt School District. The panel decision was not received by the parents until February 26, 1993. An appeal of the decision was filed on March 25, 1993.

By order of this officer the parties were permitted to submit briefs and orally argue the case. With the consent of the parties the time for issuing a decision was extended to permit briefing. The order establishing the briefing schedule indicated that the case would be considered submitted as of May 28, 1993. At the request of the parents, oral argument was heard on June 21,

1993. As a result of the oral argument, the date at which the case was considered to be formally submitted has been extended to June 21, 1993. The parties were advised of this extension at the oral argument. The parents concurred, and the School District made no objection.

Nicholas Clynes is a twelve-year-old male student who resides in the Fort Zumwalt School District in St. Charles County and who has been diagnosed as having a learning disability. Robert and Ann Clynes, Nicholas' natural parents, are his parents for the purposes of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and Missouri special education statutes.

Nicholas entered Kindergarten in the Fort Zumwalt School district in the 1986-87 school year. In February, 1987, the District sought to evaluate him to determine if he needed special education and related services.

Upon completion of the testing, a staffing was held in May, 1987, at which time Nicholas was diagnosed as having a learning disability. District personnel met with the parents in May, 1987, to develop his IEP.

The test results indicated that he had learning disabilities in reading, and delays in math and fine motor skills. The test scores indicated that he was in the 7th percentile in reading, the 19th percentile in math, and the 69 percentile in science, social studies and humanities.

In May, 1987, the District recommended that Nicholas repeat Kindergarten. Mrs. Clynes objected to his being retained. The District acquiesced, and he was placed in the first grade, with support form the LD resource room.

While in Kindergarten he started having physical

complaints, head and stomach pains, which appeared to be related to stress at school.

His Individual Education Program (IEP) for the 1987-88 school year provided for special instruction in math, 150 minutes, and in reading 225 minutes per week, (75 minutes per day). In January 1988, the special education resource room time was increased from 75 minutes to 105 minutes per day (525 minutes per week).

Although two of his teachers testified that he made great progress, tremendous academic gains and success to be proud of, the school district recommended retention in the first grade. The descriptions of his first grade achievements are clearly inconsistent with the decision to retain him in the first grade. Since there is not reason to believe that the school district had a punitive attitude toward Nicholas and since his parents concurred in the retention, we would submit that the retention says more about his progress than the comments of the teachers.

The IEP for the 1988-89 school year reduced his special education time. Resource room time was decreased to 75 minutes a day (200 minutes a week for reading, 75 minutes for math and 100 minutes for spelling and written expression). After retaking the first grade, he was promoted to the second grade for the 1989-90 school year.

At the beginning of the 1989-90 school year, he was re-evaluated. The test results showed weaknesses in word attack skills, written language and auditory skills. In math he was in the 32nd percentile. In spelling he was at a 1.5 grade level. The report also noted cause for concern with his behavior. It also stated that the evaluation profile was consistent with interpersonal difficulties, inappropriate behavior, unhappiness,

depression and physical symp oms.

The IEP for the second grade, 1989-90, reduced resource room time to 60 minutes a day (100 minutes per week for reading, 100 for written language and 100 for math).

Nicholas was passed to the third grade for the 1990-91 school year. His IEP for that year reduced his special education time to 45 minutes a day (75 minutes per week in reading, 75 minutes in language and 75 minutes in math). The report card that he received in May 1991 contained grades of D in arithmetic, D- in reading, F in spelling and 77% in science. The results of a Missouri Mastery and Achievement Test taken in the Spring of 1991 showed Nicholas in the 15th percentile for Reading/Language Arts, 15th percentile for mathematics, 18th percentile for science and 8th percentile for social studies/civics.

The district did not recommend or offer Nicholas an opportunity to participate in a summer school program at any time during his period at Hawthorne.

Nicholas' mother was actively involved with his education both at home and at school. She tutored him at home and was a volunteer at school where she had an opportunity to observe his school performance. Throughout this period he was becoming more aggressive and isolated. Finally, he reached a point where his mother concluded that he could not read. This conclusion was consistent with his grades and his scores on the Missouri Mastery and Achievement Test.

Dissatisfied with Nicholas' progress at Hawthorne, his parents sought other alternatives. They learned of Churchill School and enrolled him there for a summer program between the 3rd and 4th grade.

At the meeting with District personnel to prepare an IEP for

the 1991-92 school year, Mrs. Clynes was told by Ms. Whig, the Principal, "Ann, I don't know what else to do, we have tried everything. Nick's attitude now has taken over, its in the way, and he has chosen not to learn."

When she expressed her concerns over her son's lack of progress in reading to Pat Moore, the District's Supervisor of Special Education, Ms. Moore responded by telling her that some people were non-readers.

The IEP that was prepared for the 1991-92, 4th grade, proposed one hour a day in the special education resource room, (reading 170 minutes, written language 100 minutes, math 30 minutes).

The parents were dissatisfied and were seeking a self-contained classroom program for Nicholas' academic program. The District never offered any such program. While Hawthorne School had a special education resource room, it apparently did not have the facilities for a self-contained classroom until the 1992-93 school year. Self-contained classroom students were sent to Dardenne School. Apparently the first time that the parents learned of this was in February 1993 at the hearing on this placement.

Convinced that the District's program was non-responsive to their son's needs, the Clynes enrolled him in the Churchill School for the summer. Churchill is a private school that only teaches children with disabilities.

After a successful summer session at Churchill, Nicholas was enrolled for the 1991-92 school year. The program is one on one. The evidence is that Nicholas has made progress since enrolling in Churchill School. Emotional and physical problems have been brought under control and there has been a marked

improvement in his academic performance.

As a result of the 1991-92 experience at Churchill School, the District's IEP for Nicholas for the 1992-93 school year provided for placement in a self-contained classroom for all of his reading, math, spelling. language and study skills instruction (3.3 hours a day in special education).

In this case the parents are seeking reimbursement for the summer session and the 1991-92 and 1992-93 school years' expenses incurred in sending Nicholas to Churchill School.

In its decision, the Hearing Panel described the issue as follows:

> The issue of the hearing is one of placement. The Petitioner is contending that their placement of Nicholas in a non-public school is appropriate based on his special educational and related service needs and that this was done because the school's program was not appropriate to meet his needs. In addition, they are requesting that the school pay for Nicholas' placement and that they be reimbursed for tuition paid.

In deciding against the parents the panel majority gave the following rationale:

> The Petitioner contended that the student was regressing while attending the Fort Zumwalt School District. The evidence presented did not support this contention. While the subject of the hearing was having difficulties, his regular class grade cards, his special education progress notes, and the report from

the private therapist working with him indicated that he was making progress.

While not approved by the Department of Elementary and Secondary Education the hearing panel believes that the Churchill School is a viable educational institution appropriately certified by the Association of Independent Schools. The Hearing Panel recognizes that the subject of the hearing did make progress while attending Churchill School. The Churchill School serves children with learning disabilities. There are no non-disabled students attending the Churchill School.

Testimony from Ms. Wernig, from the Churchill School, indicates that the Churchill School's tutorial teacher program and the auditory-visual approach to instruction could be implemented by a public school. Ms. Clemens, the only person with first hand experience with both educational settings, testified that she believes that the Fort Zumwalt School District could provide the subject of the hearing a free appropriate public education. An IEP developed in the Fall of 1992 also indicates an appropriate educational program for the subject of the hearing in a least restrictive setting of his home school.

We recommend that the multi-disciplinary team, including staff from the Churchill School, reconvene to develop an IEP for the subject of the hearing. The subject of the hearing should have counseling support

> to help deal with his learning disabilities and we recommend that this be considered as a related service when the team develops his IEP. We would suggest that the IEP team consider working on the student taking more personal responsibility and that his special educational program build on his strengths. The subject of the hearing responds well to positive reinforcement for work completed and therefore we recommend that the school not use cost-responsive behavior management system. The subject of the hearing seems to respond to having one teacher managing his educational program and to using an auditory-visual approach to instruction. Therefore, we recommend the IEP team assign one person to manage his program and that his instruction reflect an auditory-visual approach.

Parents claim that the decision should be reversed because the findings of the majority are inconsistent with the result reached.

Parents point out that the majority found that Nicholas had made progress at Churchill, that the staff of Churchill should be involved in preparing Nicholas' next IEP, that there should be an audio-visual approach to instruction and that his instruction should be managed by a single person. Parents argue that the majority has ordered the District to do what it failed to do, and that such a holding is inconsistent with the conclusion that the District had been meeting its responsibilities to Nicholas.

Counsel for the District has set out the legal standard that applies in this case in his brief. It is a reasonably concise

statement so we will incorporate the relevant parts in this decision without specific attribution.

The IDEA was passed to provide educational opportunities for students with disabilities when the Congress determined that many children with disabilities were either being excluded from the classroom or misplaced so that their education had no meaning, **Board of Education of the Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176, 191 (1982) (citing H.R. Rep., at 2). The IDEA's stated purpose is to:

> assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designated to meet their unique needs, to assure that the right of children with disabilities and their parents or guardians are protected, . . . and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. § 1400(c). The IDEA gives disabled students a substantive right to public education and conditions federal assistance to states upon a state's compliance with substantive and procedural goals of the Act. **Honig v. Doe**, 484 U.S. 305, 310 (1988).

The "free appropriate public education" required by the IDEA must be tailored to each child's unique needs and take place in the least restrictive environment suitable for the child. 10 U.S.C. § § 1400(c) and 1412(B). Free appropriate public education requires "personalized instruction with sufficient support services to permit the child to benefit educationally from

that instruction." **Rowley**, 458 U.S. at 203.

To develop the proper program for each eligible child, the IDEA mandates that school districts develop an individualized education program ("IEP") for each eligible child. The IEP, prepared at meetings between the school district, the child's teacher, and the child's parents or guardians, defines the child's present educational performance, establishes annual goals and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. 20 U.S.C. § 1401(19). The IDEA requires that the IEP be reviewed and, if necessary, revised, no less than annually. 20 U.S.C. § 1414(A)(6). The end result of an IEP is a placement which is intended to meet that child's educational needs.

It is important to note that the structure of the IDEA shows a strong congressional preference for the mainstreaming of children with disabilities into regular classroom settings whenever appropriate. **Daniel R.R. v. State Board of Education**, 874 F.2d 1036, 1044 (5th Cir. 1989). In the Eighth Circuit, the mainstreaming requirement means placement in the regular public school where possible. **Evans v. District No. 17 of Douglas County Nebraska**, 841 F.2d 824, 832 (8th Cir. 1988).

The regulations promulgated pursuant to the IDEA require that "a continuum of alternative placements [be] available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.551(a).

Recognizing that on occasion the school district is unable to provide sufficient support services to the disabled child, the IDEA gives the state the option of providing free appropriate public education in private schools and facilities. 20 U.S.C. §

1413(a)(4)(B)(i). In such instances, "the State educational agency shall determine whether such schools and facilities meet the standards that apply to State and local educational agencies." 20 U.S.C. § 1413(a)(4)(B)(ii). In Missouri, placement in private schools is permitted provided the school has been approved by the State Board of Education.

The IDEA is not intended to require states to achieve strict equality of opportunity or services. This standard has been applied to school districts in Missouri. **A.W. v. Northwest R-I School District**, 813 F.2d 158, 163-64 (8th Cir. 1987). See also **Evans**, 841 F.2d at 831 ("In addition, courts must recognize that the 'primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.' [**Rowley**, 458 U.S.] at 207. We take this directive to mean that if a child is progressing satisfactorily with the current instructional method, it is not our place to question whether different methods might work better.") Instead, the IDEA creates a "basic floor of opportunity" which consists of "access to specialized instruction and related services which are individually designed to provide educational benefits to the handicapped child." **Rowley**, 458 U.S. at 201. The IDEA opens the door of public education to handicapped children on appropriate terms [rather] than [guaranteeing] any particular level of education once inside." **Rowley**, 458 U.S. at 192. Thus, the education secured by the IDEA is not the best possible, but instead appropriate.

The Supreme Court has ruled that parents do have the right to place their child in a private institution and seek

reimbursement. **School Con mittee of the Town of Burlington v. Department of Education**, 471 U.S. 359 (1985). However, "parents who unilaterally change :heir child's placement during the pendency of review proceedings without the consent of state or local school officials, do so at their own financial risk." **Town of Burlington**, 471 U.S. at 374.

The question before the panel and this reviewing officer is whether the education that the District proposed to offer in 1991-92 and 1992-93 was appropriate for Nicholas in light of his educational history. In reviewing the decision, it is not clear that the panel majority ever decided that question.

First, the panel improperly imposed a burden on the parents of proving that their son "was regressing while attending the Fort Zumwalt School District". Counsel for both sides indicated at oral argument that neither could find any controlling authority on who carries the burden of proof before the hearing panel. It strikes us that the burden of proving that Nicholas was receiving an appropriate education rests on the District. The statute gives the child an entitlement to such an education. In addition, the District is obviously more qualified and has easier access to the required resources to carry such a burden than would the parents of the child.

Second, the panel majority improperly identified the issue before it. The question was not whether Nicholas was regressing. The question was whether the education being offered was appropriate.

Third, because the panel sits and hears the testimony of the witnesses before it, great deference should be given to the manner in which it weighs the evidence. However, to receive this deference there must be some indication that it did in fact

weigh the evidence.

In the present case the majority rested its determination that Nicholas "was making progress" on his grade cards, his special education progress notes, and the report of a private therapist who had worked with him. There is nothing to indicate what weight or consideration to the majority gave to the seven witnesses who appeared before it. There is no indication that it evaluated the IEPs that had been prepared for Nicholas throughout the years. There is no indication that it considered the testimony that the District had given up on Nicholas. There is no indication that it evaluated the various tests and reports describing Nicholas' progress. In addition, the law requires more than a finding that Nicholas was not regressing and was making some unquantified progress.

The only place in the majority decision where there is evidence that it considered these other factors is in that part of the decision which recommends the involvement of Churchill Staff in preparing the next IEP, that counseling support be provided and that one teacher manage Nicholas' education program. The inference to be drawn from these findings is, as parents argue, that the District had not met its responsibility to provide Nicholas an appropriate education.

It is the decision of this officer that the evidence does not support the panel majority's decision that Nicholas was offered an appropriate education for the 1991-92 school year and that his parent's placement of him at Churchill for that year was proper and reimbursable. In addition since the evidence indicates that attendance at the 1991 summer session was a prerequisite for entry in the fall, parents are entitled to reimbursement for 1991 Summer school expenses at Churchill School.

The teacher comments on Nicholas' report cards are for the most part well intentioned attempts to find positive things for comment. However, the comments overstated performance and at times were contradictory.

Throughout his period of schooling Nicholas had definite problems with stress and anger that were related to his poor academic performance. These problems did not subside until after he had attended Churchill School. The District's response to this situation was to encourage him to get better control of himself.

The various IEPs show a hit and miss approach to dealing with his failures. There was no focused effort to follow up on failures and to produce a plan of progress that could be clearly demonstrated. The District is not under any obligation to make Nicholas an honor student, however it should demonstrate that it has identified the problem areas, applied the appropriate resources and has either produced satisfactory results or has an explanation why the student's performance is the best that can be expected from him.

The 1992-93 school year presents a different issue. The law favors the provision of education by the public education authorities. A failure to provide an appropriate education in the past is not a disqualification from providing an appropriate education in the future. The evidence in this case is that with the preparation of the IEP for 1992-93 the District was ready, willing and able to provide to Nicholas anything that Churchill School had to offer. That is all that is required of the District.

Since the 1992-93 IEP was not prepared until October 19, 1992, the parents will be entitled to reimbursement of Churchill School related expenses through the end of October unless they

can demonstrate that they were required to prepay, without a right of refund, Churchill School tuition through a longer period, for example, to the end of the semester. In which event, they would be entitled to reimbursement through the end of the first semester.

Parents shall further be reimbursed for the cost of travel to and from Nicholas' home to Churchill School through October 1992 at the rate of twenty eight cents (.28) a mile. If the parties are unable to reach agreement on the amount of reimbursable expenses they should notify the Department of Secondary and Elementary Education no later than thirty (30) days from the date of this decision. If necessary, we will hold a hearing to receive evidence on the matter of the amount to be reimbursed.

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William M. Barvick

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Dated

United States Court of Appeals
For the Eighth Circuit

Nos. 96-2503/2504

Fort Zumwalt School District,	*	
	*	
Appellant/Cross-Appellee,	*	
	*	Appeal from the
	*	United States
v.	*	District Court for the
	*	Eastern District of
	*	Missouri.
Robert Clynes; Ann Clynes, as	*	
Parents and Next Friends of	*	
Nicholas Clynes,	*	
	*	
Appellee/Cross-Appellant.	*	

Submitted: April 16,1997
Filed: July 10, 1997

Before FAGG, FLOYD R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involves competing interests under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § § 1400-1499. Robert and Ann Clynes sued the Fort Zumwalt public school district to obtain reimbursement for the cost of sending their son Nicholas to a private school for learning disabled children for the 1991-92 and 1992-93 school years. The district court awarded reimbursement to the Clynes, but denied their additional claims for damages and interest. Both sides appeal from the aspects of the judgment unfavorable to them. We affirm in part and reverse in part.I.

Nicholas Clynes was diagnosed with a learning disability in reading and math when he was in kindergarten at Hawthorne school, which is part of the Fort Zumwalt school district. The school responded by developing an individualized educational plan (IEP) each year as required by IDEA to set out a curriculum to address his disabilities. See 20 U.S.C. § 1414a(5). The IEPs placed Nicholas in a classroom for learning disabled students part of each school day for individualized instruction in reading and math, but he spent the rest of the day with non-disabled students. Nicholas attended Hawthorne from kindergarten through third grade, and each year the school altered the amount of specialized instruction he received in response to his needs.

Nicholas' parents attended meetings each year in which the IEPs were discussed. The school district provided the Clynes with a written explanation of their rights under IDEA, and Mrs. Clynes later testified that she had read this information. In May 1991, the Clynes met with district representatives to discuss the IEP for 1991-92. They expressed concern with their son's

progress and the way his needs were being addressed at Hawthorne. They did not sign the IEP and told the district that they had enrolled Nicholas for summer school at Churchill, a private school for the learning disabled. Mrs. Clynes testified that she had indicated at the meeting that she preferred postponing any final decision on the IEP until "the first or second week of the fall, at that time I will have more information." The IEP itself stated that it would be reviewed in September.

During the summer of 1991 Nicholas was admitted by Churchill for the school year that would begin in the fall of 1991. In August the Clynes informed the school district that Nicholas was going to attend Churchill for the 1991-92 school year. He attended the school from the summer of 1991 through at least the spring of 1993.

IDEA requires that a disabled child be provided with access to a free appropriate public education. Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982). Parents who believe their child's education falls short of the federal standard may obtain a state administrative due process hearing, and in some cases may be awarded reimbursement to pay for private school costs. See 20 U.S.C. 1415(b)(2) (review process); School Comm. Of Burlington, Mass. v. Department of Educ., 471 U.S. 359, 372 (1985) (reimbursement). The final determination of the state administrative process may be appealed to federal district court, 20 U.S.C. 1415(e)(2), and that court is to make an independent decision of the issues based on a preponderance of the evidence, giving "due weight" to the state administrative proceedings. Rowley, 458 U.S. at 205-06. The level of deference accorded to the state proceedings is less than required under the substantial evidence test commonly applied in federal administrative law

cases, but consideration should be given to the fact that the state hearing panel has had the opportunity to observe the demeanor of the witnesses. Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996). Where there is a conflict between the findings and conclusions of the hearing panel and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observation of the witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators. See id. Finally, courts are not to "substitute their own notions of sound educational policy for those of the school authorities which they review." Rowley, 458 U.S. at 206.

The Clynes invoked the administrative process to seek reimbursement for the cost of sending Nicholas to Churchill for the 1991-92 and 1992-93 school years. At the state hearing, both sides presented testimony and offered documentary evidence, and the hearing panel, composed of two educators and a lay person, applied the federal legal standard under IDEA. The panel denied the Clynes' claim for reimbursement for both school years, concluding that Nicholas had been making progress at Hawthorne, his disability did not warrant complete segregation from non-disabled students, and the school district was prepared to provide a free adequate public education to Nicholas.

The Clynes appealed this decision to a state level review officer (SLRO). The SLRO stated that it was not clear that the hearing panel had determined whether the education offered to Nicholas by the district was appropriate and that the panel had improperly placed the burden on the Clynes to show that their son was regressing at Hawthorne. The SLRO inferred that the district had not offered an adequate education program for 1991-92

because the panel had proposed significant changes in the 1992-93 IEP as a result of Nicholas' experience at Churchill. The SLRO described the prior IEPs as "hit and miss" and as not having produced a demonstrable plan of progress. He believed the district had not identified problem areas or applied appropriate resources in order to achieve satisfactory results and that it had not explained why Nicholas' performance is "the best that can be expected from him." The SLRO reversed the hearing panel decision with regard to the 1991-92 school year and ordered reimbursement through the end of October 1992.[3] Reimbursement beyond that time would only be available if the Clynes could demonstrate that they had been required to pre-pay tuition at Churchill without the right of refund.

The school district appealed the SLRO's decision to federal court. After a hearing the district court awarded reimbursement to they Clynes for both the 1991-92 and 1992-93 school years, as well as the 1991 summer school session. The court concluded that the 1991-92 IEP had not offered Nicholas a free appropriate public education and that Nicholas' education at Churchill complied with IDEA. It examined Nicholas' grades, test scores, and advancement from grade to grade at Hawthorne and found that Nicholas had not benefited "sufficiently" from his education there and that the 1991-92 IEP was inadequate. The IEP merely increased Nicholas' time in the learning disabled classroom and continued the past methods of teaching him to read, but it did not sufficiently address his needs or his behavioral

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[3]The SLRO's award included reimbursement for the 1991 summer school session because he found Nicholas' participation in that session had been necessary in order to attend Churchill for the next school year.

problems. The court also believed the 1992093 IEP did not comply with IDEA requirements because it did not offer appropriate reading instruction, was not designed to enable Nicholas to "recognize and accept his learning disabilities," and did not offer a completely segregated environment, which the court believed was the only appropriate environment for him. It primarily based its order of reimbursement for the 1992-93 school year, however, on the fact that the IEP had not been developed until after Nicholas had started the year at Churchill, and the Clynes had contracted to pay for the entire year.

II.

Whether a school district has offered a free appropriate public education is a mixed question of fact and law and the district court's ultimate determination is reviewed de novo. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995) Hampton Sch. Dist. v. Doborowolski, 976 F.2d 48, 52 (1st Cir. 1992); but see Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th Cir. 1991) ("whether or not a program is appropriate is a matter of fact"). The standard of review in this circuit is de novo as to the ultimate finding of the district court. See Petersen v. Hastings Pub. Sch., 31 F.3d 705, 707-08 (8th Cir. 1994).

IDEA requires a school district to offer an educational program "reasonably calculated to enable the child to receive educational benefits." Petersen, 31 F.3d at 707 (quoting Rowley, 458 U.S. at 206-07). Parents who believe their child will not receive an educational benefit under an IEP may enroll the child in a private school and later obtain reimbursement for those costs

if a federal court concludes (1) the school district did not offer a free appropriate public education; and (2) the private school placement complied with IDEA. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 (1993). Parents who enroll their child in private school without the approval of the public school district do so with the risk they will not receive reimbursement for their costs. School Comm. of Burlington, 471 U.S. 373-74; Florence County, 510 U.S. at 15.

The goal of IDEA is to provide access to public education for all handicapped students. See Rowley, 458 U.S. at 179-81. Congress provided limited resources to the states to implement the policy of educating all disabled students, and the sufficiency of that education must be evaluated in light of the available resources. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 164 (8th Cir. 1987); see also Rowley, 458 U.S. at 179-81 (intention to reach all unserved disabled students). IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. Rowley at 203; A.W., 813 F.2d at 163-64. The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education. Rowley, 458 U.S. at 195. IDEA's goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[4] Id. at 192. IDEA requires disabled students to be educated with non-disabled students

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[4]The SLRO stated that the district must show that it has "either produced satisfactory results or has an explanation why the student's performance is the best that can be expected from him." Under IDEA a school district is not required to maximize a student's potential.

whenever possible. Id. at 202. In determining whether a disabled student's education is sufficient under IDEA, courts must consider the nature of the student's disability. Id.

The district court made extensive factual findings based on a hearing and on evidence presented to the state hearing panel. The school district diagnosed Nicholas as being delayed in reading and math by one year or more at the end of his first year at Hawthorne, and he subsequently repeated first grade.[5] In May 1991, when Nicholas was in third grade, his reading skills were at the second grade level, his word attack skills (which enable readers to identify words they have not seen before) were at the first grade level, and he could not write a complete sentence. He had received three Ds and an F in reading that year and mostly Cs in all other subjects. A standardized test administered in September 1991, after Nicholas left Hawthorne, placed his reading skills in the second to ninth percentile. Nicholas' teachers at Hawthorne primarily used Dolch sight lists (visual cues and context) to teach him to read, but the also used phonics (auditory cues) to help him recognize words. Hawthorne emphasized use of the Dolch sight lists because Nicholas was more successful with this method, but he had not learned how to read long words that he did not recognize by sight. The school decreased the amount of time Nicholas spent in the learning disabled classroom from 26 percent in his second year in the first grade to 13 percent of his time in third grade.

The district court found Nicholas had behavioral

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[5]There was testimony at the state hearing that school authorities had wanted Nicholas to repeat kindergarten, but that the Clynes insisted that Hawthorne promote him to first grade.

difficulties at Hawthorne. Evaluations of Nicholas done when he was in second grade characterized him as poorly motivated, easily frustrated, and feeling different from his peers. The 1991-92 IEP placed him with non-disabled students for the majority of the day. The court noted the following statements of district personnel: his third grade teacher had said "his attitude is reflected in his [poor] grades;" his "reading grade reflects his effort;" "[h]e needs to stop the excuses & just work;" and "[o]ften he appears to be apathetic about school." The court also found that one of Nicholas' teachers told Mrs. Clynes she did not know what else she could do since Nicholas had chosen not to learn, and the director of special education told her that some children are non-readers.

The district argues that Nicholas had made progress at Hawthorne and the IEPs were sufficient to confer an educational benefit. The court erred by requiring a program to maximize Nicholas' ability, by comparing his progress to non-disabled students, and by failing to examine the IEPs from the perspective of the time when they were written. The comments made by educators that were critical of Nicholas' attitude should not have been interpreted to mean that they had given up on addressing his problems, but rather as simply reflecting his behavior. Furthermore, the district court did not properly consider IDEA's requirement for educating disabled students in the least restrictive environment.

The Clynes respond by pointing out that Nicholas' reading skills were very weak when he left Hawthorne, that the public school system did not effectively address their concerns, and that the district had given up on educating him. Although the state hearing panel ruled in favor of the district, it had recommended that it incorporate techniques used by the Churchill school. The

Clynes argue this recommendation necessarily supports the inference that the 1991-92 IEP did not offer a free appropriate public education because it was generally different from the Churchill program. The 1992-93 IEP in turn was inadequate because it did not incorporate the Churchill program as the state hearing panel had suggested. The Clynes also contrast the benefits Nicholas received from his education at Churchill with his difficulties at Hawthorne.

After studying the underlying factual findings of the district court in light of the record and legal standards under IDEA, we conclude that the school district did offer Nicholas a free appropriate public education as required by Congress. Although Nicholas may well have benefited more from his education at Churchill than at Hawthorne, and he did not read as well as his non-disabled peers or as his parents hoped, IDEA does not require the best possible education or superior results. The statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student. Nicholas' record at Hawthorne indicates that he was making progress and that the 1991-92 IEP would have provided educational benefit to him. Despite his learning disabilities in reading and math, Nicholas earned passing marks in third grade[6] and mostly Cs in mathematics. Although Nicholas did not have well developed work attack skills, his overall reading skills had improved, and he had been promoted to fourth grade just before his parents removed him from Hawthorne. See Rowley at 203 (grades and

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[6]Nicholas received one failing grade in spelling in one quarter and another in reading in a different quarter, but he earned passing grades in both subjects in the other three quarters.

advancement from grade to grade "an important factor[s] in determining educational benefit"). The 1991-92 IEP called for Nicholas to spend over one quarter of each school day in the specialized learning disabled classroom in order to address his disabilities, double the amount of the previous year. See id. at 196 (nothing that Congress "equated an 'appropriate education' tot he receipt of some specialized educational services"). The Hawthorne IEP set goals in work recognition, comprehension, language skills and math, and the specialized education provided was reasonably calculated to enable him to benefit from his public education.[7]

The teaching methods used by Hawthorne were likely to confer an educational benefit. Although the district court was disturbed by the level of Nicholas' word attack skills and the emphasis on Dolch sight lists for his reading instruction, it did not focus on the fact that the 1991-92 IEP set goals for word attack or on the testimony that phonics was also to be used. The court's criticism of the educational methods used by the district was not based on findings of the state educators who reviewed the matter. Courts "lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," Rowley, 458 U.S. at 208 (internal quotation marks and citation omitted), and they must "avoid imposing their view of preferable educational methods." Id. at 207. No state educational authority criticized Hawthorne's method of teaching Nicholas how to read. Both of the state educational experts on the hearing panel found

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[7]The increase in specialized education for 1991-92 and the district's willingness to review the IEP to consider what was learned from Nicholas' experience at summer school belies the Clynes' assertion that the district had given up on educating Nicholas.

that Nicholas had benefited from the instruction provided at Hawthorne. As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology. Id. at 208.

Placement of disabled students in segregated environments is appropriate "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5). Although Nicholas' behavior may have been affected by his interaction with non-disabled peers, non of the state educational experts concluded that Nicholas needed a segregated environment. The SLRO attributed his poor behavior to his difficulty in academic classes, not to his association with non-disabled students, and the hearing panel indicated that Nicholas should not be segregated from non-disabled students. The 1991-92 IEP would have allowed Nicholas to interact with non-disabled students while providing educational benefit to him, and the conclusion of the state educational reviewers that a segregated environment was not appropriate for his is another factor indicating that the Hawthorne program complied with IDEA.

Even though the 1991-92 IEP met IDEA's requirements, the school district offered to improve it in the fall of 1991, but the Clynes removed Nicholas from Hawthorne before the district had an opportunity to review the IEP and attempt to come to agreement with them. Mrs. Clynes testified that in May 1991 she told the school district that she did not agree with the 1991-92 IEP, would not sign it, and would like it to be reviewed in the fall of 1991 in light of Nicholas' summer program at Churchill. The 1991-92 IEP itself stated that it was to be reviewed in September

1991, but before that time came the Clynes informed the school district in August that Nicholas had been enrolled in Churchill for the year. The abrupt removal of Nicholas from Hawthorne prevented the district from following through on the request made by the Clynes for a review in the fall and from responding to their then current concerns.[5] See Evans v. District No. 17, 841 F.2d 824, 831-32 (8th Cir. 1988) (no failure to provide free appropriate public education where the school district had not been given an opportunity to change the child's educational placement).

In sum, the Clynes were not entitled to reimbursement from public funds for the costs of sending Nicholas to private school in the summer of 1991 and the 1991-92 school year. The 1991-92 IEP called for an increase in special educational services in Nicholas' areas of disability while advancing IDEA's mainstreaming purpose by placing him with non-disabled students for a substantial portion of the school day. The IEP outlined his particular needs and responded to them in compliance with IDEA, and Hawthorne had agreed to consider possible improvements after Nicholas returned from summer school.

The Clynes removed Nicholas from Hawthorne without the permission of the school district before they sought review under IDEA, thus putting themselves at risk that they would not be reimbursed for private school costs. Evans, 841 F.2d at 832. Parents may not obtain reimbursement for the time a child is

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[5]Contrary to the dissent's contention that the school district was unwilling to explore any different approaches, there is evidence that the school district would have altered Nicholas' IEP upon his return from the summer at Churchill. The IEP developed in 1992 called for changes in his instruction as a result of his experience at Churchill.

placed in private school without the permission of the school district if it is ultimately determined that the proposed IEP met the IDEA requirements. See Burlington Sch. Comm., 471 U.S. at 374; Evans, 841 F.2d at 832; see also 34 C.F.R. § 300.403 (1997) (no requirement for state to pay private school costs if child has available free appropriate public education). Since the 1991-92 IEP met IDEA requirements, the Clynes were not entitled under federal law to reimbursement for either the the 1991-92 or 1992-93 school years.[9]

III.

The issues raised by the Clynes in their cross-appeal are without merit. They appeal the denial of their claim for reimbursement for interest on loans they took out to pay for Nicholas' private school education at Churchill. We need not decide whether interest is ever available under IDEA because by enrolling Nicholas at Churchill without the permission of the

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[9]The 1992-93 IEP developed by the school district also met IDEA requirements. In August 1992, the school district offered to meet with the Clynes to resolve the issues relating to Nicholas' educational placement, and they met that month. Nicholas was reevaluated by the school district in Septemb r, and although he was enrolled at Churchill and his parents had not yet sought review by the state hearing panel, his IEP was revised in October. The IEP called for double the amount of individualized special education compared to the 1991-92 IEP, and four times the amount he had received in 1990-91. The 1992-93 IEP set goals in, among other things, decoding, vocabulary, comprehension, and written expression. At the same time, he was placed with non-disabled students in non-academic subjects.

school district, the Clynes took the risk that they would not receive reimbursement from public funds for their loans, let alone for the interest on them. They also appeal the dismissal of their claims for damages under IDEA, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132; 42 U.S.C. § 1983; and Section 504 of the Rehabilitation Act of 1973, § 794, for physical illness and emotional distress caused by the district's allegedly incompetent and unprofessional failure to provide Nicholas with an adequate education. The damage claim cannot succeed because the district offered Nicholas a free appropriate public education, and damages are not available for IDEA violations. Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996). We affirm the rulings of the district court on these issues.

IV.

For the reasons discussed, the public school district was not obligated to reimburse the Clynes for Nicholas' education at the Churchill private school, and the Clynes have not shown that the district court erred in denying them relief on their cross-appeal. We affirm in part, reverse in part, and remand for entry of judgment in favor of the school district.

Floyd R. Gibson, Circuit Judge, concurring in part and dissenting in part.

I agree that our decision in Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996), precludes the Clyneses from recovering damages in this action, and I can conceive of no authority that would allow them compensation for interest on

loans they took out to pay for Nicholas's private schooling. Therefore, I concur in Part III of the Court's opinion. Nonetheless, because I would affirm the district court's judgment in toto, I respectfully dissent from Part II of the opinion.

IDEA makes available federal money to assist the states in educating disabled children. See Board of Educ. v. Rowley, 458 U.S. 176, 179 (1982). To share in these funds, participating states must agree to offer a "free appropriate public education" to all disabled children. 20 U.S.C. § 1412(1) (1994). As a measure to ensure that Congressional goals are met, IDEA directs local school districts, in consultation with parents, teachers, and, where appropriate, the child himself, to develop an "individualized education program" ("IEP") for each disabled student. Id. § 1401(18), (20). An IEP satisfies IDEA's requirement of a free and appropriate education so long as it "consists of educational instruction specially designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Rowley, 458 U.S. at 188-89.

If parents feel that their child's IEP does not afford a free appropriate public education, they may, under certain circumstances, unilaterally place the child in a private school pending administrative and judicial review of the IEP. See School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 369-370 (1985). This is, at least from a financial perspective, a perilous maneuver, for as the majority correctly recognizes, parents are entitled to reimbursement for the costs of enrolling their disabled child in a private facility "only if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act."

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). Applying this test to the facts of the instant case, I agree with Judge Gunn that the Clyneses are entitled to compensation for the expenses they incurred in sending Nicholas to the Churchill School.

Before proceeding to the merits of this appeal, a word must be said about the applicable standard of review. We have described federal review of the state administrative process as a "quite narrow" endeavor. Petersen v. Hastings Pub. Sch., 31 F.3d 705, 707 (8th Cir. 1994). This is because the federal courts do not possess "the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," Rowley, 458 U.S. at 208 (quotations omitted), and we must therefore give "due weight" to the state proceedings, id. at 206. In IDEA cases originating from a state such as Missouri, which has created a two-tiered administrative system, we must give deference to the opinion of the state level review officer ("SLRO"), who is the person empowered to issue a final decision for the state. See Thomas v. Cincinnati Bd. Of Educ., 918 F.2d 618, 624 (6th Cir. 1990) ("[T]he only logical position, under Rowley and general principles of administrative law, is that federal courts are required to defer to the final decision of the state authorities, in this case that of the SLRO."); Karl v. Board of Educ., 736 F.2d 873, 877 (2d Cir. 1984) ("We believe Rowley requires that federal courts defer to the final decision of the state authorities, and that deference may not be eschewed merely because a decision is not unanimous or the reviewing authority disagrees with the hearing officer."); cf. Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996) (declining to definitively answer this question); Carlisle Area Sch. v. Scott P.,

62 F.3d 520, 528-30 (3d Cir. 1995) (deeming it appropriate to defer to opinion of state appeals panel, but assuming that the federal courts should accord somewhat less consideration to an appeals panel ruling that disregards a hearing officer's credibility findings which find in support in the record), cert. denied, 116 S.Ct. 1419 (1996). Likewise, though the majority is correct in stating that we should examine de novo a district court's ultimate determination of whether an IEP is appropriate, we are bound by a district court's underlying factual findings unless they are clearly erroneous. See Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996).

In light of the detailed factual findings made by the district court, and giving "due weight" to the SLRO's determination that the IEP for the 1991-1992 school year was inappropriate, I am unable to conclude that Fort Zumwalt provided Nicholas a free appropriate public education for that period. The district court found that from September of 1989 to May of 1991 Nicholas's word attack skills had not risen above a first grade level, see Fort Zumwalt Sch. Dist. v. Missouri State Bd. Of Educ., 923 F.Supp. 1216, 1222 (E.D. Mo. 1996), and a standardized test administered in September of 1991 revealed that his reading proficiency ranked in the second to ninth percentile, see id. at 1224. At the closed of his fifth year in the Fort Zumwalt School District, Nicholas Clynes, at the age of ten, still did not know the alphabet, could not recite the days of the week, and could not identify the months of the year.[10] See id. at 1222. It is true, as the majority points out,

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[10]At Nicholas's state due process hearing, his father, Robert Clynes, testified that the child had mastered these tasks within two weeks after entering the Churchill School. App. at 477.

that Fort Zumwalt promoted Nicholas to the fourth grade, but it is notable that in third grade Nicholas did not receive a mark above a "C." See id. at 1221. By the end of the year, Nicholas had failed Spelling and had managed to raise a failing grade in Reading for the third quarter to a "D" for the final quarter. See id.

In the face of these disturbing trends, Fort Zumwalt prepared an IEP for 1991-1992 that did not propose any significant changes in Nicholas's educational placement. See id. at 1222. The IEP did set goals in word attack skills, but Nicholas's resource room instructor, Miss Ruhr, testified that she would continue to emphasize the child's ability to recognize the meaning of sighted words, a method that had failed miserably in the past to enhance Nicholas's reading aptitude. See id. At the meeting to discuss the IEP, the Clyneses expressed concern with Nicholas's inability to read and asked what alternatives were available to their son. See id.; App. at 459-60. The district reacted by attributing Nicholas's academic shortcomings to his own poor attitude and refusal to put forth the requisite effort. See Fort Zumwalt, 923 F.Supp. at 1222. Miss Ruhr stated that she had "tried everything" and did not "know what else to do"; in her opinion, Nicholas had "chosen not to learn." See id.; App. at 26. Alarmed by this response, Mrs. Clynes later telephoned Pat Moore, Fort Zumwalt's director of special education, to discuss Nicholas's meager progress. See Fort Zumwalt, 923 F.Supp. at 1222. Mrs. Moore informed the worried mother that some children are simply "non-readers" despite the district's best efforts. See id. After deciding that the district had given up on

Nicholas,[11] the Clyneses enrolled the child in the Churchill School.

I agree with the SLRO and the district court that the IEP for 1991-1992 was not designed to provide "personalized instruction with sufficient support services to permit [Nicholas] to benefit educationally from that instruction." Rowley, 458 U.S. at 203. By submitting an IEP substantially similar to others that had previously produced so few positive results, and by exhibiting an

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[11]Mrs. Clynes's testimony regarding her conversation with Mrs. Moore provides revealing insight into the parents' point of view:

> At that time, you know, [after Mrs. Moore had made the remark] about the non-reader, I then asked her if she had any knowledge of Churchill. She said, "Yes, I'm aware of Churchill but, no, I don't per se know the programs, or anything like that," and I had let her know that, "I'm quite concerned that something needs to be done," that I had been to my pediatrician, that, you know, "He is recommending that Nick needs more help in this area," and she made no offer whatsoever of maybe I need to sit down with you, maybe we need to get together and see if there's a better program for your son, at which time I proceeded to hang up from her, call my husband and say, "That's it, no one gives a blank about our son, it's time for us to take control," and I did.

App. at 435-36.

unwillingness to explore any different approaches,[12] Fort Zumwalt did not extend to Nicholas the free and appropriate education mandated by IDEA. To be sure, Nicholas was steadily advancing from grade to grade in the Fort Zumwalt schools, and the Supreme Court has stressed that "[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit," Rowley, 458 U.S. at 203, but Nicholas's achievements, particularly in the area of reading skills, can at best be described as trivial. This cannot be the sort of education Congress had in mind when it enacted IDEA. See Mrs. B. v.

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[12]The majority contends that "[n]o state educational authority criticized [the district]'s method of teaching Nicholas how to read," but the SLRO's decision included the following admonition:

> The various IEPs show a hit and miss approach to dealing with [Nicholas's] failures. There was no focused effort to follow up on failures and to produce a plan of progress that could be clearly demonstrated. The District is not under any obligation to make Nicholas an honor student, however it should demonstrate that it has identified the problem areas, applied the appropriate resources and has either produced satisfactory results or has an explanation why the student's performance is the best that can be expected from him.

App. at 34-35 (emphasis added). While this might not be an outright condemnation of Fort Zumwalt's teaching methods, it comes very close, and it certainly discloses the SLRO's assessment that the IEP was clearly deficient. Cf., e.g., 20 U.S.C. § 1401(20)(F) (instructing that an IEP should contain "appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved").

Milford Bd. of Educ., 103 F.3d 1114, 1120-21 (2d Cir. 1997) (reasoning that the Rowley standard contemplates more than mere trivial advancement); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3d Cir. 1988) ("[W]hen the Supreme Court said 'some benefit' in Rowley, it did not mean 'some' as opposed to 'none.' Rather, 'some' connotes an amount of benefit greater than mere trivial advancement."), cert denied, 488 U.S. 1030 (1989); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty under [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial."); cf. Rowley, 458 U.S. at 203 n.25 ("We do not hold today that every [disabled] child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.'"). The majority, in resolving that Fort Zumwalt did offer Nicholas a free appropriate public education, not only does disservice to Congressional intent, but also disregards the deference we are required to give to the conclusion reached by the SLRO.[13]

---

[13]The Court does not seem to place dispositive weight upon our decision in Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988), but the Court does suggest that the Clyneses did not comply with the notice requirement we announced in that case. I disagree. In Evans, we affirmed the district court's denial of reimbursement to parents who had precipitously enrolled their child in a private school, explaining that "[a] school district should be on notice of disagreements and given an opportunity to make a voluntary decision to change or alter the educational placement of a [disable] child." Id. at 831-32. We acknowledged, however, that parents may independently choose an appropriate private placement "if it is likely that no change would be made which would benefit [the

In sum, I think the district court properly decided that the 1991-1992 IEP was deficient. I additionally believe the Churchill School was without a doubt an appropriate placement for Nicholas (the facts confirm his improvement at the school),[14] and I

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child] (if the school district had made it clear that no change in the placement would occur)." Id. at 832.

Unlike the claimants in Evans, see id. at 831, the Clyneses specifically requested some alternative placement for Nicholas. See App. at 460 ("[A]t th[e IEP] meeting I said, 'Well, what else can you offer, self-contained?'"); App. at 475-76 ("During the [IEP] meeting we said we were very dissatisfied with what was happening with Nick, he still wasn't learning. We asked them at that point in time what other programs they had, and my wife mentioned self-contained, and they said at that point in time Nick was not a candidate for self-contained."); App. at 435-36 ("I had let [Pat Moore] know that, 'I'm quite concerned that something needs to be done,' that I had been to my pediatrician, that, you know, 'He is recommending that Nick needs more help in this area,' and she made no offer [of help]."). The position adopted by Nicholas's educators in answer to these pleas, as disclosed by statements at the IEP meeting and Mrs. Moore's comments to Mrs. Clynes, evidenced a likelihood that "no change would be made which would benefit [Nicholas]," Evans, 841 F.2d at 832, and there is absolutely no reason to believe that the district would have drastically altered its stance had it received one more opportunity to assess the IEP. Consequently, I do not think Evans stands as an impediment to reimbursement in this case.

[14]Having determined that Fort Zumwalt did offer Nicholas a free appropriate public education, the majority has apparently found it unnecessary to evaluate the propriety of placement at the Churchill School. The Court does, though, mention IDEA's mainstreaming requirement. See 20 U.S.C. § 1412(5) (1994). I

would thus hold that the Clyneses are entitled to reimbursement for the summer of 1991 and the 1991-92 school year. Furthermore, because the district did not prepare the 1992-93 IEP until after the Clyneses had contractually committed to send Nicholas to Churchill for that term, I would also approve reimbursement for the 1992-93 school year. To the extent the majority has decided otherwise, I respectfully dissent.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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would hold that the preference for mainstreaming is honored where parents send their child to an academy, such as the Churchill School, which employs a curriculum designed to prepare the student for a return to a regular classroom environment.

United States Court of Appeals
For the Eighth Circuit

No. 96-2503EMSL

Fort Zumwalt School District,	*	
Appellant/Cross-Appellee,	*	
	*	Order Denying
	*	Petition for
v.	*	Rehearing and
	*	Suggestion
	*	for Rehearing En
	*	Banc
Robert Clynes, et al.,	*	
Appellee/Cross-Appellant.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestions. The petition for rehearing by the panel is also denied.

September 30, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

Nº. 97-1568

In The
Supreme Court of The United States
October Term 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,
Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

JURISDICTION

The Clynes are represented at no cost to them by Missouri Protection and Advocacy Services. This agency is a public law center which receives its funds from the federal government. This non-profit agency has a scarcity of funds with which to conduct its services on behalf of people with disabilities.

In this case, the undersigned sought to minimize the costs associated with filing a Petition for Writ of Certiorari. In that effort, he sought to produce an appropriate document on his computer and then have it printed and bound at Kinkos. Unfortunately, that effort was not a successful one. However, the initial Petition was filed in this Court in good faith. Primarily because the Petition printed and bound by Kinkos did not have 3/4 inch margins, as the undersigned thought he had produced on his computer, this Court returned it to him pursuant to Rule 14.5.

Upon the return of the Petition, the undersigned secured the necessary funds to send the Petition to an experienced printer of Petitions for Writs of Certiorari to be filed in this Court. In his work with that printer, the undersigned was told that the Petition, properly formatted and spaced, was nine (9) pages too long. For that reason, and no other, the undersigned sought to reduce the size of the initial Petition by nine (9) pages, without changing its substance.

The undersigned was able to do that by deleting one argument, which related to damages and their availability under the IDEA. The undersigned further deleted some argument in the remaining questions presented, but did not change the substance.

Contrary to the assertion of Ft. Zumwalt, the undersigned did not utilize the additional sixty days to "rewrite and revise" the

Petition. (FTZ Resp. at 16). Rather, the only changes made were deletions accompanied with appropriate passages of short duration which allowed for a coherent and logical flow of the document.

Ft. Zumwalt has chosen to lodge in this Court the initial Petition. Certainly, the Clynes are delighted with this opportunity to point the Court to that lodged document. Indeed, if it is the position of Ft. Zumwalt that the original document ought to be the one reviewed by this Court, the Clynes are wholeheartedly in favor of that position.

The undersigned reiterates that he engaged in a good faith effort to file an appropriate brief in this Court in timely fashion. That he failed to do so is embarrassing, but has nothing to do with an attempt to gain an advantage, and Ft. Zumwalt has not claimed that it has been prejudiced in any way.

NO STANDARD TO APPLY

The different positions taken by the parties in this matter may be ascertained by reviewing how they phrase their "questions presented." The Clynes assert that any standard created by this Court in ***Rowley*** is indefinite and does not give sufficient guidance to judges. Ft. Zumwalt states the question is whether the Eighth Circuit has properly articulated the legal standard. The foundation of this Petition and Reply rests upon the thesis that there is no legal standard to apply properly. The issue is not whether the Eighth Circuit articulated and applied the appropriate standard, but whether there is a standard that exists. We posit that there is none and this Court ought to take this case so as to create one.

The Clynes believe that they have established in their Petition, and the cites to cases therein, that this Court has not set forth a standard which when applied by the various courts results in predictable and equitable results. This position cannot be made clearer than in this case. Ft. Zumwalt, in its response to the

Petition for Writ of Certiorari, states : "The Eighth Circuit's opinion cites directly and repeatedly to ***Rowley*** in stating the appropriate standard for determining FAPE. There is no evidence that in the present case, the Eighth Circuit applied any standard different from that set forth by this Court." (FTZ Resp. at 20). The standard referred to by Ft. Zumwalt, that a school district only has to provide a program "reasonably calculated to enable the child to receive educational benefits," has been cited by each judge who reviewed this as support for his or her position. However, the Due Process panel split two-to-one in favor of Ft. Zumwalt. The State Level Review Officer found in favor of the Clynes. The District Court found in favor of the Clynes. The Eighth Circuit split two-to-one in favor of Ft. Zumwalt. One might conclude from reading the response of Ft. Zumwalt that only the Eighth Circuit majority cited ***Rowley*** for its position, since the standard is clear. The problem is, "some educational benefit" means something different to everyone who has reviewed this case, which is why it has resulted in a vote of four-to-four of the eight people who have been charged with making a decision in regard to it.

In his conclusions of law, the District Court thought it understood what the proper standard was when reviewing this case, that found in ***Rowley***. This is what it had to say:

> "122. Whether a free public education is 'appropriate' depends upon whether the education is 'sufficient to confer some educational benefit upon the handicapped child." *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). The child's grades, tests scores, and advancements from one grade level to the next are important evidence for the Court to consider in assessing whether the child has benefited from her education. *Id.*

* * *

"130. Nicholas did advance from one grade to the next after the 1988-89 school year and passed many of his classes. *See supra* pp 2, 15, 21, 25. However, Nicholas repeated first grade and tests scores showed that his reading skills remained the below grade level at the end of his third grade year. *See supra* pp 11, 32-33, 39. Also, he could not write a complete sentence when he entered the Churchill school. *See supra* pp 27. Perhaps more disturbing, Nicholas's word attack skills never advanced past a first grade level while he attended Hawthorn. *See supra* ¶ 33.

"131. The District did not change its methods for teaching Nicholas and did not consider changing his placement even after those methods proved unsuccessful. *See supra* pp 18-21, 27-39. The third grade IEP did not even set goals for word attack skills. *See supra* pp 22-23. Faced with poor test scores in May of 1991, and declining grades, the District merely increased Nicholas's time in the LD Resource Room after decreasing it each year. *See supra* pp 10, 14, 17, 22, 40.

"132. While the IEP for the 1991-92 school year did set goals in word attack skills, Nicholas's teacher stated that she would have continued to focus on Nicholas's vocabulary of 'sighted words.' *See supra* at ¶ 41. By failing to address Nicholas's serious decoding problems, the District failed to address adequately Nicholas's learning disability. *See supra* pp 23, 28-38, 41.

"133. The District also did not deal with Nicholas's problems with frustration and low self-esteem. District staff blamed Nicholas for their own failures. *See*

supra pp 26-27, 42-43. They accused Nicholas of giving up on himself when they had given up on Nicholas. *Id.* (Pet App. at 29-33).

Judge Gibson, who dissented from the majority of the Eighth Circuit, also understood what the appropriate standard was, relying on ***Rowley***. Judge Gibson spent an entire paragraph discussing the standard for FAPE set forth in ***Rowley***. (Pet App. at 68). Judge Gibson stated in salient part:

> "An IEP satisfies IDEA's requirement of a free and appropriate public education so long as it 'consists of educational instruction specifically designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child to 'benefit' from the instruction." [***Rowley*** 458 U.S. at 188-189.]

[Pet App. at 68]. Judge Gibson then reviewed the facts and measured them according to this Court's pronouncements in ***Rowley***:

> "In light of the detailed factual findings made by the district court, and giving 'due weight' to the SLRO's determination that the IEP for the 1991-1992 school year was inappropriate, I am unable to conclude that Fort Zumwalt provided Nicholas a free appropriate public education for that period. The district court found that from September of 1989 to May of 1991 Nicholas's word attack skills had not risen above a first grade level, see Fort Zumwalt Sch. Dist. v. Missouri State Bd. Of Educ., 923 F.Supp. 1216, 1222 (E.D.Mo. 1996), and a standardized test administered in September of 1991 revealed that his reading proficiency ranked in the second to ninth percentile, see id. at 1224. At the close of his fifth year in the Fort Zumwalt School District, Nicholas Clynes,

at the age of ten, still did not know the alphabet, could not recite the days of the week, and could not identify the months of the year. See id. at 1222. It is true, as the majority points out, that Fort Zumwalt promoted Nicholas to the fourth grade, but it is notable that in third grade Nicholas did not receive a mark above a 'C.' See id. at 1221. By the end of the year, Nicholas had failed Spelling and had managed to raise a failing grade in Reading for the third quarter to a 'D' for the final quarter. See id.

In the face of these disturbing trends, Fort Zumwalt prepared an IEP for 1991-1992 that did not propose any significant changes in Nicholas's educational placement. See id. at 1222. The IEP did set goals in word attack skills, but Nicholas's resource room instructor, Miss Ruhr, testified that she would continue to emphasize the child's ability to recognize the meaning of sighted words, a method that had failed miserably in the past to enhance Nicholas's reading aptitude. See id. At the meeting to discuss the IEP, the Clyneses expressed concern with Nicholas's inability to read and asked what alternatives were available to their son. See id.; App. at 459-60. The district reacted by attributing Nicholas's academic shortcomings to his own poor attitude and refusal to put forth the requisite effort. See Fort Zumwalt, 923 F.Supp. at 1222. Miss Ruhr stated that she had 'tried everything' and did not 'know what else to do"; in her opinion, Nicholas had 'chosen not to learn.' See id.; App. at 26. Alarmed by this response, Mrs. Clynes later telephoned Pat Moore, Fort Zumwalt's director of special education, to discuss Nicholas's meager progress. See Fort Zumwalt, 923 F.Supp. at 1222. Mrs. Moore informed the worried

mother that some children are simply 'non-readers' despite the district's best efforts. See id. After deciding that the district had given up on Nicholas, the Clyneses enrolled the child in the Churchill School.

I agree with the SLRO and the district court that the IEP for 1991-1992 was not designed to provide 'personalized instruction with sufficient support services to permit [Nicholas] to benefit educationally from that instruction.' Rowley, 458 U.S. at 203. To be sure, Nicholas was steadily advancing from grade to grade in the Fort Zumwalt schools, and the Supreme Court has stressed the "[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit," Rowley, 458 U.S. at 203, but Nicholas's achievements, particularly in the area of reading skills, can at best be described as trivial. This cannot be the sort of education Congress had in mind when it enacted IDEA."

(Pet App. at 70-73).

Of course, the SLRO understood what the standard was, that announced by this Court in ***Rowley***. The SLRO spent over a page discussing the standard he found in ***Rowley***. (Pet App. at 46-47). After reviewing the facts the SLRO officer measured them by the standard announced by this Court in ***Rowley***. The SLRO found that the evidence did not support the panel majority's decision that Nicholas was offered FAPE for the 1991-92 school year and that his parents' placement of him at Churchill for that year was proper and reimbursable. (Pet App. at 51).

Each of these three judges thought they understood what this Court meant when it enunciated its so-called standard in ***Rowley***. The majority of the Eighth Circuit thought they understood the standard announced by this Court in ***Rowley***. Because the standard

is amorphous, without any discernable limits, each judge was allowed to read the facts as he or she felt appropriate in light of their own unique and individualized experiences in life. That is no standard. That is no process. That is a sure recipe for a denial of equal protection.

DEFERENCE

Ft. Zumwalt states the majority of the Eighth Circuit panel afforded the appropriate level of deference to the district court below. (FTZ Resp. 23-24). If the majority of the Eighth Circuit panel had deferred to the factual findings of the district court it would have concluded that Nicholas could not write a complete sentence when he entered the Churchill School; that his word attack skills never advanced past a first grade level while he attended Hawthorn; that faced with poor test scores in May of 1991 and declining grades, the district adamantly refused to change its educational program for Nicholas, and blamed him for his learning disability; that the district staff blamed Nicholas for their own failures; that the district staff accused Nicholas of having given up on himself when they had given up on him; that district officials ignored the advice of Mr. Arnett, Nicholas's first grade teacher during the 1988-89 school year. (Pet App. at 32-33). Judge Gibson, who dissented on the Eighth Circuit, thought it appropriate to defer to these findings of fact of the district court. (Pet App. at 70).

Instead of deferring to the findings of fact of the District Court, unless clearly erroneous, the panel majority sat as a super fact finder and made its own findings of fact, findings that no one had ever made in this case. It made critical findings of fact which were completely contrary to those made by the SLRO and by the district court. For instance, both the district court and the SLRO found that the District had given up on Nicholas. The panel

majority stated: "The comments made by educators that were critical of Nicholas's attitude should not have been interpreted to mean that they had given up on addressing his problems, but rather simply reflecting his behavior." (Pet App. at 61). As noted by the Clynes in their Petition, other circuits, like the Fifth in ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997, *cert. denied*, 118 S.Ct. 690 (1998)), and the Ninth Circuit in ***County of San Diego v. California Special Education Hearing Office***, 93 F.3d 1458 (9th Cir. 1996), defer to the district court's factual determinations unless clearly erroneous. The determination of how much deference is to be accorded to the fact findings of the district court is the subject of a split in the circuits.

DEFERENCE TO THE SLRO

There is a clear split in the circuits on this point as well. In his dissent, Judge Gibson notes that in states which employ a two-tiered administrative system, such as Missouri, deference is to be given to the person empowered to issue a final decision for the state. Citing, ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618, 624 (6th Cir. 1990) (the only logical position, under ***Rowley*** and general principles of administrative law, is that federal courts are required to defer to the final decision of the state authorities, in this case that of the SLRO.) [Pet App. at 69].

Not only did the majority of the Eighth Circuit ignore the findings and conclusions of the SLRO, they did so while creating a standard never enunciated before or since: "The [district] court's criticism of the educational methods used by the district was not based on findings of the state educators who reviewed the matter." (Pet App. at 63). In fact, there are no state educational experts who reviewed any portion of this case. In Missouri, three panel members sit on the Due Process Hearing. The parents pick a panel member from an approved list, and the school district picks a panel

member from an approved list. Then the parties agree on the Chairperson to be picked from an approved list. In this case, the school district selected as its panelist a special education director, like a defendant in this case, Pat Moore. It was a situation of colleague reviewing a colleague. Hardly could the panelist selected by Ft. Zumwalt be called a state educational expert. He was not employed by the state and he was not an expert. He was just a special education director of a public school district. The chairperson was also a special education director of a public school district.

To whom deference is due is dispositive. There is a split in the circuits on this issue. Interestingly, Ft. Zumwalt does not even discuss ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618 (6th Cir. 1990).

CONCLUSION

The Clynes respectfully request that this Court issue its Writ to the Eighth Circuit so that it may clarify its standard of 'some educational benefit' anent FAPE; and, announce a rule of process whereby it is definite to whom deference is due in regard to the findings of facts in IDEA cases. Without a solid framework within which to analyze facts, we are left with the present situation which amounts to each judge ruling based upon his own life experiences.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 22 1998
OFFICE OF THE CLERK

No. 97-1568

In The

Supreme Court of the United States

October Term, 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,

Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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31pp

RESPONSE TO PETITIONERS' QUESTIONS PRESENTED

The Questions Presented by Petitioners do not accurately reflect the issues in this case. Specifically, Petitioners overstate the issues in hopes of creating some reason for this Court to grant review. Concisely stated, the only issues properly raised in this case are as follows:

I. Whether the Eighth Circuit articulated and applied the appropriate legal standard in determining that Ft. Zumwalt was providing Nicholas a free appropriate public education;

II. Whether the Eighth Circuit afforded the appropriate level of deference to the district court below; and

III. Whether the Eighth Circuit granted the appropriate levels of deference to the due process hearing panel and the State Level Review Officer.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEDURAL BACKGROUND

Petitioners Robert and Ann Clynes ("the Clynes" or "the Parents"), as parents and next friends of Nicholas Clynes ("Nicholas"), attempt to appeal from the Eighth Circuit's decision reversing the District Court's opinion below and holding that Respondent Fort Zumwalt School District ("Ft. Zumwalt"or "District") was not legally obligated to reimburse the Clynes for Nicholas' education at the Churchill private school. The key issue on appeal to the Eighth Circuit was whether Nicholas Clynes was offered a free appropriate public education by Ft. Zumwalt for the 1991-92 and 1992-93 school years.

On February 1, 1993, a special education due process hearing was held pursuant to RSMo. § 162.961 at the request of the Clynes. [App. 22][1]. At the hearing, Mr. and Mrs. Clynes requested that the panel review the appropriateness of the educational placements proposed by the District for the 1991-92 and 1992-93 school years and award them tuition reimbursement for those two school years for their unilateral placement of Nicholas at Churchill School, a private school for learning disabled children located in St. Louis County, Missouri. [App. 10 *et seq.*]. A record of the due process hearing was made and the transcript and exhibits were included in the record

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[1] Consistent with the Petition for A Writ of Certiorari, cites to "App." refer to the Appendix filed in the Eighth Circuit. Likewise, cites to "Pet. App." refer to the appendix filed with the Petition to this Court.

before the State Level Review Officer and the District Court and are included in the record and Appendix before this Court. [*See* App. 364 *et seq.*]. After due deliberation, the hearing panel, in a 2-1 decision, ruled in favor of the District. [App. 13].

The Clynes appealed the hearing panel's decision to a State Level Review Officer ("SLRO"), pursuant to RSMo. § 162.962 (1995). [App. 22]. On or about June 29, 1993, the SLRO reversed the decision of the Panel and awarded the Clynes reimbursement for the 1992-93 school year and for a portion of the 1992-93 school year. [App. 22-36]. The District timely appealed to the District Court pursuant to 20 U.S.C. § 1415(e)(2). [App. 1]. The Clynes cross-appealed and filed a counter-claim. [App. 37]. On or about October 11, 1994, the District Court dismissed the Clynes' counterclaim. [App. 105]. On or about November 11, 1995, the District Court conducted a bench trial at which the parties were permitted to present limited additional evidence. [App. 115-225]. On or about May 1, 1996, the District Court entered its judgment and order in which it concluded that the Clynes were entitled to reimbursement. [App. 322-56]. The District timely appealed to the United States Court of Appeals for the Eighth Circuit on May 22, 1996. [App. 357]. The Clynes filed a cross-appeal on May 24, 1996. [App. 361]. On or about July 10, 1997, the Eighth Circuit reversed the District Court and held that the Clynes were not entitled to tuition reimbursement for their unilateral placement of Nicholas at the Churchill School. [Pet. App. 67].

B. STATEMENT OF FACTS

Nicholas is an adolescent male student who was born March 24, 1981. [App. 11, 323]. Nicholas began his academic career with Ft. Zumwalt at the beginning of the 1986-87 school year. [App. 11, 323]. Nicholas' Kindergarten teacher immediately noticed that Nicholas was delayed and referred him for an evaluation for a possible learning disability. [App. 383-85]. In March 1987, the Clynes consented to an evaluation. [App. 710].

As part of the evaluation, the District administered the WISC-R on May 5, 1987. Nicholas' resulting full scale IQ was 112, placing him in the normal range of intelligence. [App. 716]. The evaluation summary prepared by the District in May 1987 indicates that Nicholas displayed inconsistency in the classroom and tended to give up when things became difficult. [App. 714]. Significantly, the evaluation summary also recognizes that Nicholas' reading and math scores were delayed, falling more than one year below his current chronological age. [App. 387-88, 714, 718].

Upon completion of the testing, the District held a staffing in May 1987, at which time Nicholas was diagnosed as having a learning disability in the areas of math and reading. [App. 718, 721]. District personnel met with the parents in May 1987 to develop an Individualized Educational Plan ("IEP") for Nicholas. [App. 721]. The IEP recommends a highly structured, individualized instructional program in the areas of math and reading. [App. 388, 720]. The IEP also recommends that Nicholas' teachers utilize a multi-modal approach to learning with

him and recognizes that "[classroom observations indicate difficulties maintaining on task behavior." [App. 723]. The IEP enumerates goals and objectives in the areas of word attack, alphabetizing, reading and math and calls for 375 minutes per week of individualized special education in the resource room. [App. 724-28].

Also, in May 1987, the District recommended that Nicholas repeat Kindergarten, in part, because Nicholas came to the District without pre-Kindergarten readiness skills and without the level of maturity expected of a kindergarten student. [App. 384, 389]. However, Mrs. Clynes absolutely objected to Nicholas being retained. [App. 389, 674]. The District acquiesced, and Nicholas was placed in the first grade, with support from the learning disabled ("LD") resource room and with a part of each day being initially spent in the kindergarten class. [App. 674-75, 712]. The May 1987 IEP developed for Nicholas was implemented during that year. [App. 390, 721]. At that time, the Clynes did not challenge nor did they seek due process with respect to any portion of the 1987-88 IEP. [App. 670]. Indeed, at hearing, Mrs. Clynes testified that, up until Nicholas' third grade year, she had **no** complaints and **no** reason to complain regarding his educational program. [App. 426].

Once Nicholas was identified as learning disabled and began receiving part of his instruction in the resource room, he received two report cards. [App. 448]. Nicholas would receive a traditional report card from his regular classroom where he was graded against an absolute norm – *i.e*, his classroom performance was compared to that of other children in the class. [App. 448]. Nicholas also received a detailed, narrative report card from his

resource teacher that notes Nicholas' individual progress in relation to the IEP goals and objectives developed for him. [App. 447-48, 456, 659-60].

During the 1987-88 school year, Nicholas' special education teacher worked closely with his regular first grade teacher to provide Nicholas with an appropriate education and frequently visited the regular classroom. [App. 677, 683]. Moreover, consistent with Mrs. Clynes' testimony that she had no complaints regarding Nicholas' education until his third grade year, Nicholas made progress on his IEP goals and objectives. [App. 677, 732-32A]. As indicated in Nicholas' resource room narrative progress reports, he had many areas that needed improvement, but his resource teacher "saw such success with him that year in developing the readiness skills, and [she] thought that he was pretty proud of that." [App. 684]. Moreover, the special education teacher noted in Nicholas' report card that "[h]e has made tremendous academic gains already," having mastered 120 of the Dolch sight reading words and his beginning initial consonant sounds and was therefore ready to begin "attack on sight words." [App. 732]. In spite of his learning disabilities and behavioral problems, Nicholas' regular classroom report card for the 1987-88 year reflects that Nicholas was reading, at that time, on grade level and receiving passing grades in the regular classroom. [App. 1061-62]. During the 1987-88 school year, the District sent the Clynes notification of the District's intent to increase Nicholas' time in the LD resource room. [App. 390, 677, 730]. Because spelling had become an area of concern, Nicholas' time in the LD resource room was increased from 375 minutes per week to 525 minutes per week in

order that the special education teacher would continue to have sufficient time to devote to the reading and math goals and objectives in Nicholas' IEP. [App. 677, 730].

In the May 1988 staffing held for Nicholas, the report prepared by Nicholas' IEP team noted that he had experienced "great academic success" during 1987-88. [App. 733]. However, because Nicholas' performance had declined during the last few weeks of school and because his teachers noted heightened concerns regarding his behavior and distractibility, the District, consistent with its earlier recommendation to retain Nicholas in Kindergarten, recommended that he be retained in first grade, and he was. [App. 397-98, 731, 733].

The IEP developed for Nicholas for the 1988-89 school year indicates that, although "achievement testing and classroom performance reveal much academic growth, especially in the areas of reading and spelling," Nicholas continues to show a significant discrepancy between achievement and ability in reading, spelling and math. [App. 736]. The IEP contains goals and objectives in the areas of math, spelling, reading and phonics and calls for a total of 375 minutes per week of individualized instruction in the special education room. [App. 736-41]. Moreover, the IEP notes that the "method of choice for reading instruction centers around the combination of a language experience approach and a wholistic, sight word approach." [App. 736]. Further, the IEP calls for an intervention system to deal with Nicholas' behavior and provides opportunities for peer tutoring as a positive reinforcement technique. [App. 736]. Nicholas' special education teacher testified that the resource room time

was decreased somewhat based on "Nick's performance and success level" at that time. [App. 680].

During the 1988-89 school year, the year during which Nicholas repeated the first grade, his LD resource teacher was Karla Ruhr. [App. 644]. Nicholas' regular report card for the year shows that Nicholas was receiving passing grades in all subject areas and was reading at grade level. [App. 397-98, 903, 1059-60]. Nicholas' resource room narrative report also details the progress on his IEP goals and objectives. [App. 749-50]. Although Nicholas made sufficient progress to be promoted to second grade at the conclusion of the 1988-89 school year, his teachers noted that he needed improvement in several areas, particularly math and reading. [App. 749-50, 1059-60].

In accordance with federal and state law, Nicholas was re-evaluated at the beginning of the 1989-90 school year and continued to be diagnosed as learning disabled. [App. 751-52]. The re-evaluation summary indicates that "Nicholas is experiencing difficulty in the reading, spelling and math areas . . . His behavior difficulties still seem to directly affect his relationship with others and his performance in the classroom setting." [App. 771]. In the summary, the team notes that modified seating arrangements and peer grouping had been used with some success for dealing with inappropriate behaviors. [App. 771]. The evaluation summary also states that, consistent with his disability, Nicholas' greatest area of difficulty in reading was with word attack skills on which he tested below grade level. [App. 772]. Testing showed, however, that Nicholas was at grade level in math computation and concepts. [App. 771]. The IEP developed for Nicholas in

May 1989 (for the 1989-90 year) requires resource time of 300 minutes per week. [App. 748]. That IEP notes, that although "Nick is easily frustrated and needs much positive reinforcement and praise," the "[a]chievement testing and classroom performance reveal much growth during the current school year." [App. 744]. Once again, the IEP contains appropriate goals and objectives in the areas of math, written language, reading, phonics, punctuation and capitalization [App. 745-48].

Nicholas' second grade report card shows that, although he needed improvement in many areas, he was receiving passing marks in all subjects and was reading on a second grade level. [App. 1057-58]. Karla Ruhr continued to be Nicholas' LD resource teacher during the 1989-90 and 1990-91 school years – Nicholas' second and third grade years, respectively. [App. 645]. Ms. Ruhr testified that she communicated frequently with Nicholas' regular classroom teachers during this time and that they discussed, among other things, the ways in which his IEPs could be implemented. [App. 645]. In addition, Ms. Ruhr noted that she went into the regular classrooms to observe Nicholas' regular classroom teachers working with him. [App. 647]. Ms. Ruhr also testified that, at the beginning of Nicholas' second grade year, his appropriate instructional level was at the second grade. [App. 667, 903].

The IEP developed for Nicholas' third grade year (1990-91) authorizes 225 minutes in the resource room, a decrease from previous years. [App. 791]. Mrs. Clynes and the District's witness testified that one of the reasons for decreasing resource room time, in addition to Nicholas' level of performance, was to increase his self-

esteem. [406, 465, 625, 263]. The third grade IEP contains goals and objectives for individualized instruction in the areas of reading, written language, math, word recognition and comprehension, and spelling. [App. 786-90]. Although the IEP indicates that a sight word approach to reading is the method of choice, [App. 785] and does not contain a specific word attack objective, Nicholas' resource room progress reports illustrate that Ms. Ruhr consistently worked with him on word attack skills. [App. 796-96].

By the end of the third grade, Nicholas was reading at the third grade/second semester level. [App. 444, 659, 670, 799, 903]. Mrs. Clynes testified at the hearing that, with respect to his regular classroom performance in the areas of his disability, Nicholas was receiving predominantly passing grades. [App. 407].

Although Nicholas was reading at grade level at the end of the third grade [App. 670], the Clynes decided to enroll him for the summer in Churchill School, a private school for learning disabled students. [App. 411, 452, 498]. All students at Churchill have been diagnosed as being children with disabilities. [App. 498, 540]. Thus, there is no opportunity at Churchill for Nicholas to be educated with nondisabled peers. Sometime before May 13, 1991, the Clynes applied to have Nicholas enrolled for the Summer 1991 session. [App. 411, 452]. When the Clynes were notified that Nicholas was accepted at Churchill for the summer, Churchill also informed them that Nicholas was not accepted for the fall because there was a waiting list. [App. 430-31, 513].

On or about May 29, 1991, Churchill conducted a pre-reading test of Nicholas' abilities. [App. 1193]. According to Mrs. Clynes' testimony, the time at which Churchill tested Nicholas (the fourth quarter of the school year), is considered to be the time of Nicholas' worst performance. [App. 401]. Indeed, the Churchill testing examiner noted Nicholas' uncooperative attitude during this testing, writing that "Nick was very controlling at the beginning; wouldn't work, had a *bad* attitude – totally negative." [App. 1193 (emphasis in original)]. Moreover, the tests administered by Churchill, although standardized in that they use a controlled population, do not generate standard scores and, thus, cannot be compared to other tests, such as the ones used by the District. [App. 150, 551, 587, 1214]. The testing consisted of, among other things, requiring Nicholas to use a phonics approach to word decoding and asking Nicholas to sound out nonsense words. [App. 587]. Phonics and word attack has always been a weakness for Nicholas, and using nonsense words with Nicholas was not appropriate. [App. 562, 588-89, 650-51]. In spite of this, the testing showed that Nicholas' word attack skills were below grade level (consistent with past Fort Zumwalt testing), but indicated that his reading and sight word skills were "nearer his grade placement of third grade." [App. 1218]. Churchill, using this non-standardized, informal assessment, placed Nicholas' reading ability at the pre-primer level and based its programming for Nicholas on that testing, rather than on his previously demonstrated reading level of third grade. [App. 297, 564, 668, 903].

In the meantime, the District met with the Clynes on May 28, 1991 – after the Clynes had applied to Churchill –

to develop an IEP for Nicholas for the 1991-92 school year. [App. 800-01]. Mrs. Clynes testified that she was well aware of her procedural due process rights at the time and was fully involved in the development of the IEP. [App. 426]. That IEP calls for 300 minutes of resource room time in word recognition and comprehension, written language, math, spelling and word attack. [App. 803-14]. Mr. and Mrs. Clynes specifically requested that the IEP team review the IEP in the fall in order that information from Nicholas' summer at Churchill could be utilized. [App. 431, 503]. The IEP team agreed to do so and the IEP specifically noted that it was to be reviewed in September 1991. [App. 623, 802]. Although the Clynes expressed some dissatisfaction with Nicholas' progress at that meeting, they did not request a change in placement to Churchill. [App. 475-76, 670]. Moreover, while the Clynes testified extensively about what they perceived as a negative attitude expressed by District personnel at that meeting, [App. 432-33], Mr. Clynes also conceded that no one from the District ever stated that they could not provide Nicholas with an appropriate education in the District. [App. 517]. The Clynes did not request due process regarding the May 1991 IEP. [App. 670].

On June 25, 1991, Churchill notified the Clynes that they had no opening for Nicholas in the 1991-92 program. [App. 816]. However, a full-time opening became available for Nicholas at Churchill sometime later in the summer. [App. 514, 1121]. On August 29, 1991, Mrs. Clynes wrote to Hawthorn's principal, Mrs. Wiig, to inform her that an opening had become available and that the Clynes were going to send Nicholas to Churchill for the 1991-92 year, but did not request reimbursement or a change of

placement. [App. 817]. Thus, Nicholas did not return to Ft. Zumwalt and the District never had an opportunity to implement the 1991-92 IEP. [App. 659]. Rather, Nicholas began attending Churchill as a full-time, regular student in the fall of 1991. [App. 479-80, 1121].

In August 1992, Mrs. Clynes wrote to Dr. Dubray, the Ft. Zumwalt Superintendent, and expressed their pleasure with Nicholas' performance that summer at Churchill. [App. 846]. Although Mrs. Clynes expressed some criticism of the District's educational programming for Nicholas, she did not request a change of placement for Nicholas to Churchill nor did she request reimbursement. Dr. Dubray responded to Mrs. Clynes' letter on August 18, 1991 and noted his concern at the Clynes' disappointment. [App. 850]. In that letter, Dr. Dubray notified the Clynes of their right to due process, but suggested that they meet with him to discuss and resolve their concerns. [App. 850]. The Clynes met with the District on August 31, 1991. [App. 851].

The District re-evaluated Nicholas in late summer of 1992. [App. 818, 852]. As part of the re-evaluation and the development of an IEP for the 1992-93 school year, the District solicited information from Nicholas' teachers at Churchill. [App. 820-45]. Some of Nicholas' Churchill teachers had positive things to say about his performance and attitude. [App. 820, 833, 837, 839]. However, his teachers also noted that Nicholas talked out, got angry when learning new material, rushed through his work and worked inconsistently. [App. 829-30]. One teacher also indicated that less than 25 percent of Nicholas' work was acceptable. [App. 832]. Based upon the re-evaluation, the District held several staffing and IEP conferences to

develop a 1992-93 IEP for Nicholas. [App. 864, 867, 869, 871, 875]. Churchill staff provided significant input. [App. 865, 867-68, 870].

The present level of performance section of the 1992-93 IEP was based on the Churchill staff's assessment as well as the re-evaluation. [App. 877-78]. The IEP contains goals and objectives in word attack, vocabulary, comprehension, math, written expression and study skills and calls for Nicholas to be in a self-contained LD classroom at Hawthorn School for the majority of the school day. [App. 876, 892]. A self-contained classroom is called for where the student needs to spend in excess of three hours per day in a specialized setting for instruction and such a placement is generated by the IEP goals and objectives and the time necessary to implement those goals and objectives. [App. 621-622]. Pursuant to the 1992-93 IEP, Nicholas was to be mainstreamed for such classes as art, music, and physical education. [App. 892]. The Clynes disagreed with the educational placement proposed by the District in the 1992-93 IEP and for the first time, on November 5, 1992, requested a three-person due process hearing with respect to the issue of Nicholas' proposed placement. [App. 902].

On or about February 10, 1993, the two-member majority of the panel issued its decision in favor of the District. [App. 10]. In its written decision, the panel correctly noted that the issue for hearing was the appropriateness of the District's proposed placement as well as the appropriateness of the Churchill placement. [App. 10]. In its findings of fact, the majority concluded that Nicholas made progress at Hawthorn prior to his removal and cited to evidence supporting that conclusion. [App.

11]. The majority further found that, although Nicholas was making progress at Churchill, he was having difficulties there. [App. 12]. More specifically, the majority concluded, based on Ms. Clemens' testimony, that the District could provide an appropriate educational program for Nicholas. [App. 14]. Based on its finding that Nicholas made progress at Hawthorn, the Panel rejected the Clynes' contention that Nicholas was regressing while a student in the District and reasoned that, although Nicholas had some difficulties, his regular classroom report cards, his special education progress notes and a report from a private therapist all indicated that he was making progress. [App. 13].

On or about June 29, 1993, the State Level Review Officer overturned the Panel's decision and awarded reimbursement to the Clynes for the 1991-92 school year. [App. 35]. In addition, the SLRO concluded that the evidence established that the 1992-93 IEP showed that the "District was ready, willing and able to provide to Nicholas anything that Churchill School had to offer." [App. 35]. Consequently, the SLRO reasoned that, because that IEP was not prepared until October 1992, the parents would be entitled to reimbursement through the end of October "unless they can demonstrate that they were required to prepay, without a right of refund, Churchill School tuition through a longer period." [App. 35].

The District appealed the SLRO's decision to the District Court. [App. 1]. On November 16, 1996, the District Court conducted a bench trial for the purpose of hearing limited additional evidence. [App. 115].

On May 1, 1996, the District Court issued an Order awarding reimbursement to the Clynes for the 1991-92 and 1992-93 school years. [Pet. App. 51]. On July 10, 1997, the Court of Appeals for the Eighth Circuit reversed and held that the Clynes were not entitled to reimbursement. [Pet. App. 67].

REASONS FOR DENYING WRIT

I. THE CLYNES' ATTEMPT TO SEEK THIS COURT'S REVIEW IS JURISDICTIONALLY BARRED.

The Clynes submitted their original Petition for Writ of Certiorari ("First Petition") to this Court postmarked December 26, 1997. (First Petition lodged with this Court on or about April 20, 1997). The Office of the Clerk received this First Petition on December 29, 1997. However, the Clerk discarded the First Petition because it failed to comply with Supreme Court Rules 33 and 34, which require at least a 3/4 inch margin on all sides and that the order of the district court be included in the appendix, respectively. *See* Letter from William K. Suter, Clerk of the Court, to Michael Hillel Finkelstein, Counsel for Petitioners (Jan. 23, 1998) (letter lodged with this Court by Respondent on or about April 20, 1997).

The Clerk directed the Clynes to correct the deficiencies in the First Petition and to submit their corrected petition and appendix within 60 days. *Id.* The Clynes complied by submitting their Petition for A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit ("Petition") on March 20, 1998. However,

the Petition did not merely correct the deficiencies contained in the First Petition. Rather, the Clynes utilized the additional sixty days to **rewrite and revise** their petition. For example, the Clynes deleted an entire fourth Question Presented for Review from the First Petition. The Clynes are not permitted to utilize this additional time as an extension of the period allowed in which to timely file their Petition. For this reason, their Petition must be denied for lack of jurisdiction.

Supreme Court Rule 13 allows a party 90 days from the date of the entry of judgment in which to file a petition for a writ of certiorari to review that judgment. Sup. Ct. R. 13.1. If a party timely files a petition for rehearing in the lower court, the time to file the petition for a writ of certiorari runs from the date of the denial of the petition for rehearing. Sup. Ct. R. 13.2.

In this case, the Clynes filed a petition for rehearing that was denied by the Eighth Circuit on September 30, 1997. Under Rule 13.2, the Clynes then had 90 days from that date in which to submit their petition. After using the additional sixty days granted by the Clerk to rewrite and revise their petition, the Clynes submitted their Petition on March 20, 1998, a total of 171 days after the Eighth Circuit denied the Clynes' Petition for Rehearing.

The Clynes' use of the additional 60 days to rewrite and revise their Petition clearly violates Rule 13. This violation resulted in the submission of this Petition for Writ of Certiorari 171 days after the denial of the Clynes' Petition for Rehearing. By revising their petition, the Clynes have, in effect, circumvented Supreme Court Rule 13. Thus, this Petition was **not** timely filed in accordance

with Supreme Court Rule 13, and for this reason, this Court lacks jurisdiction. Accordingly, certiorari must be denied.

II. THE CLYNES HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Even if they had timely filed their Petition for Writ of Certiorari, the Clynes patently have failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper. *Id.* Not only have the Clynes failed to identify any such circumstances in support of their request for certiorari, they also have failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, the Clynes merely point to phantom splits of authority among the circuit courts of appeals and hint at important questions of federal law that have not yet been decided by this Court. However, neither of these two circumstances truly exists in this case.

A. This Case Does Not Involve a Split of Authority Among the Circuits.

The Clynes' arguments that this case involves a split of authority among the United States courts of appeals are erroneous. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of

appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts in order to warrant certiorari is a **direct** conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond,* 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson,* 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley,* 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States,* 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense). This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues involved.

1. The Eighth Circuit articulated and applied the proper standard in determining that Ft. Zumwalt was providing Nicholas a free appropriate public education.

Under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1415 *et seq.*), states are required to provide disabled students with a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(1). The IDEA then provides:

> A "free appropriate public education" is defined as: special education and related services that –
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State administrative agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved,
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

In *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), this Court established the appropriate standard to be used by lower courts in determining whether FAPE was being provided. The Court stated:

> [I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the checklist are satisfied, the

> child is receiving a "free appropriate public education"as defined by the Act.

Id. at 189. The Court further stated that the IDEA does not require schools to furnish "every special service necessary to maximize each handicapped child's potential." *Id.* at 199.

In this case, the Eighth Circuit applied the standard set forth in *Rowley* and determined that Ft. Zumwalt had provided Nicholas FAPE. The Eighth Circuit's opinion cites directly and repeatedly to *Rowley* in stating the appropriate standard for determining FAPE. [Pet. App. 58-59]. There is no evidence that in the present case, the Eighth Circuit applied any standard different from that set forth by this Court.

The Clynes point to cases from other circuits in an attempt to establish a split of authority among the circuits regarding the appropriate standard for determining FAPE. However, both cases cited by the Clynes apply the exact same standard used by the Eighth Circuit in this case.

First, the Clynes cite to *Mrs. B. v. Milford Bd. Of Educ.*, 103 F.3d 1114 (2nd Cir. 1996), for the proposition that the standard created by this Court in *Rowley* requires more than "mere trivial advancement." [Pet. 15]. The Eighth Circuit did not disagree. Rather, the Eighth Circuit relied on language from *Rowley* stating that although simply advancing from grade to grade does not evidence FAPE, grades and advancement from grade to grade are "important factors" in determining FAPE. [Pet. App. 62-63 (citing *Rowley*, 458 U.S. at 203 & n.25)].

Second, the Clynes cite to the Third Circuit's decision in *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 393 (3rd Cir. 1995), for the proposition that a de minimis educational benefit is insufficient to meet the *Rowley* standard. [Pet. 17]. Once again, the Eighth Circuit has never stated otherwise. However, the Eighth Circuit did emphasize in its decision below that although the IDEA requires school districts to offer educational benefits to disabled students, the Act does not require school districts to obtain maximum results for such students. [Pet. App. 62 (citing *Rowley*, 458 U.S. at 203)]. As this Court reasoned in *Rowley*, Congress never intended to impose on school districts a requirement that they maximize a handicapped student's education or achieve goals which in many cases would be impossible. *Id.* at 201 n.23.

Thus, the circuits agree that, under *Rowley*, school districts are required to provide educational programs "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207; *see also Mrs. B.*, 103 F.3d at 1119; *M.C.*, 81 F.3d at 392 (citing *Rowley*, 458 U.S. at 200, stating that school district must provide instruction "sufficient to confer some educational benefit upon the handicapped child"). Further, the circuits agree that this mandate to public school districts is limited. *See Rowley*, 458 U.S. at 201 (IDEA provides "basic floor of opportunity" for disabled students). Simply stated, there is no split of authority among the circuits regarding the proper standard to be used in determining FAPE.

Nevertheless, the Clynes ask the Court to clarify the standard to ensure uniformity of law. However, as this Court has made clear, a more exacting standard or test is impossible. In *Rowley*, this Court stated:

> The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Id. at 202.

This Court recognized that the various types and degrees of disabilities covered by the Act preclude the use of a precise and universally applied standard to determine whether individualized educational programs are adequate to meet the demands of the Act. For this reason, this Court specifically limited its decision in *Rowley* to the particular facts of that case. This is the only proper method by which courts can review the decisions of school districts regarding the education of disabled students under the IDEA. A more exacting standard would defeat the very purpose of the IDEA, which is to provide individually tailored instruction to students with vastly different levels of ability.

2. The Eighth Circuit afforded the appropriate level of deference to the district court below.

The Clynes incorrectly argue in their Petition that the Eighth Circuit rejected the clearly erroneous standard in reviewing the District Court's factual findings. [Pet. 24]. Contrary to the Clynes' contentions, the Eighth Circuit did not rest its decision on a finding that the District Court's factual findings were clearly erroneous. Rather, the Eighth Circuit's decision clearly was based on its determination that the District Court reached an erroneous legal conclusion and, in contravention of *Rowley*, substituted its notion of sound educational policy for those of the school authorities it was asked to review. [Pet. App. 63].

Indeed, the Eighth Circuit aptly noted, "whether a school district has offered a free appropriate public education is a mixed question of fact and law and the district court's ultimate determination is reviewed de novo." [Pet. App. 58]. The Eighth Circuit applied this standard and stated that *"after studying the underlying factual findings of the district court in light of the record and legal standards under IDEA,* we conclude that the school district did offer Nicholas a free appropriate public education as required by Congress." [Pet. App. 62 (emphasis added)]. This statement, in and of itself, denotes that the Eighth Circuit panel accepted the District Court's factual findings but, after a de novo review, properly reversed the erroneous legal conclusions drawn from those facts.

The Clynes attempt to create the appearance of a conflict among circuits by citing to cases from other circuits. However, their fact-intensive discussion of these

cases reveals plainly why these cases resulted in different outcomes. The cases are all based on different and unique facts. Indeed, what the Clynes argue is a "lack of uniformity" among the legal standards within the circuits is, in reality, nothing more than the ordinary difference in outcome based on the application of a well settled legal standard to different sets of facts.

3. The Eighth Circuit granted the appropriate levels of deference to the due process hearing panel and the State Level Review Officer.

The Clynes also erroneously contend that the Eighth Circuit erred by not properly deferring to the factual findings of the SLRO. In essence, the Clynes contend that the federal courts must in all but the most egregious cases support the decision of the SLRO. However, the Eighth Circuit articulated and applied the proper level of deference set forth in the IDEA.

Under the IDEA, a court reviewing an administrative determination "shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415(e)(2). The Eighth Circuit noted that this section does not require absolute deference to administrative findings, but instead calls for an independent, modified de novo review that simply gives "due weight" to the state administrative proceedings. [Pet. App. 55 (citing *Rowley*, 458 U.S. at 205-06)]. Moreover, the Eighth Circuit noted this Court's admonition that courts are not to "substitute their own notions of sound educational policy for those of the

school authorities which they review." [Pet. App. 56 (citing *Rowley*, 458 U.S. at 206)].

In this case, the Eighth Circuit majority applied the proper standard of review in concluding that Fort Zumwalt provided FAPE to Nicholas. As previously noted, the Eighth Circuit thoroughly discussed the three-member hearing panel's findings as well as the SLRO's findings and, after engaging in its own independent review and giving "due weight" to both administrative decisions, properly concluded that the Clynes were not entitled to reimbursement. Ironically, the Clynes' argument carried to its logical extreme would lead to a result opposite to that they are seeking. The record demonstrates that the SLRO awarded reimbursement only for the 1991-92 school year and a small portion of the 1992-93 school year. Yet, the Clynes do not ask this Court to give absolute deference to that part of the SLRO's decision. Simply put, the Clynes seek the application of that standard only when it serves their purpose.

The Clynes also argue that the Eighth Circuit erroneously deferred to the findings of the hearing panel and not those of the SLRO. However, there is no evidence in the opinion that the Eighth Circuit overruled any factual findings at either stage of the administrative review. The court merely stated that where the findings of the hearing panel and those of the SLRO are in conflict, "a court may choose to credit the hearing panel's findings based on observations of witnesses and reject the reviewing officer's *analysis* if it does not appear to give sufficient weight to the views of the professional educators." [Pet. App. 56]. This statement is entirely consistent with the

preponderance of the evidence standard and its "due weight" requirement.

In sum, the Eighth Circuit did not fail to give the SLRO proper deference. Rather, the court, pursuant to well-established principles, independently reviewed the record and concluded that Nicholas' IEPs were reasonably calculated to provide educational benefit. This holding was based on the undisputed facts in the record as well as the Eighth Circuit's appropriate adherence to the *Rowley* admonition that courts should not substitute their own notions of educational policy.

B. Absent a Split of Authority Among the Circuits, There Exists No Reason For This Court to Grant the Clynes' Petition.

In light of Supreme Court Rule 10 and its guidelines for determining where certiorari is appropriate, there is no reason for this Court to hear this case absent a split of authority among the circuits. This case presents no split of authority on any issue between the Eighth Circuit and other ciruits, nor does it present any important question of federal law that has not been, but should be, settled by this Court.

Although the Clynes contend that the *Rowley* decision must be further clarified by this Court to avoid its inconsistent application in the circuits, the case law suggests strongly that such clarification is not necessary. As stated above, the circuits are uniformly and consistently applying the correct legal standard to determine whether

FAPE has been provided. Further, the courts are consistently applying proper standards of review both at the district and circuit court levels.

As Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). This admonition is particularly applicable to the present case. This case presents no special or important reason for this Court to accept review under Rule 10.

CONCLUSION

For each of the reasons set forth in the School District's brief, this Court should deny the Clynes' Petition for Writ of Certiorari.

Respectfully submitted,

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